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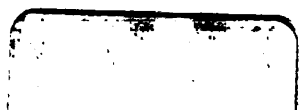
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THE
AMERICAN REPORTS

CONTAINING

ALL DECISIONS OF GENERAL INTEREST

DECIDED IN

THE COURTS OF LAST RESORT

OF THE

SEVERAL STATES,

WITH

NOTES AND REFERENCES

BY

IRVING BROWNE.

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CASES
IN THE
SUPREME COURT
OF
TEXAS.

GODDARD V. EAST TEXAS FIRE INSURANCE COMPANY.

(87 Tex. 69.)

Insurance — warranty — representation.

In a policy of fire insurance, printed on a separate piece of paper, and attached by mucilage in a blank between sentences with which it had no proper connection, the following clause was inserted: "Three-fourths loss and iron safe clause. It is agreed and understood to be a condition of this insurance that the assured shall keep a set of books, showing a record of his or their business warranted to be kept in an iron safe at night," etc. The insured did not know of this clause. *Held*, not a warranty.

ACTION on a fire insurance policy. The opinion states the case. The defendant had judgment below.

Wood & Charlton, for appellant.

Whitaker & Bonner, for appellee.

WILLIE, C. J. It is apparent from the case made by the evidence that the failure of Goddard to keep his books and inventory in an iron safe at night, did not arise from any intention on his part to deprive the insurance company of evidence as to the amount of the stock, tools and machinery he had on hand at the time of the fire. He was wholly ignorant of the existence of any clause in the policy imposing this duty upon him.

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It is not made to appear that the company has been damaged in the least by reason of Goddard's default in this respect; for the value of the stock at the time the inventory was made was fully proved, and the amount of the subsequent sales — which were all for cash — could be easily ascertained from the accounts kept in the books, which were preserved and open to the inspection of the company and the court. If there has been neither fraud on the part of Goddard, nor loss to the company by reason of his non-compliance with the said clause, it cannot be said that it was material to the risk, and the policy is not avoided unless the provisions of the clause constituted a warranty. If they did, the law exacts a compliance with the terms according to their true intent and meaning, whether material or not, or whether known to the assured or not, if he had the opportunity, and it was his duty, under the circumstances, to acquaint himself with them. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136; *Withwell v. Ins. Co.*, 49 Me. 200; *May Ins.* 161; *Wood Ins.*, §§ 58, 176.

Treating this as a case where the assured was charged with knowledge that the clause in question was attached to the policy, as it appears in the original sent up for our inspection, the question is, did this constitute it a warranty that the assured would perform the promises contained in the clause or the policy should be void?

It is a cardinal principle of insurance law that in order to constitute any statement or promise of the insured a warranty it must be made part of the policy, either by appearing in the body of the instrument, or by a proper reference in the policy to some other paper in which it is to be found. *Wood Ins.*, § 176, p. 340.

It is in the nature of a condition precedent, and as such, must form part of the contract between the parties. *Wood Ins.*, § 58; *Farmers' Loan, etc., Co. v. Snyder*, 16 Wend. 481.

The policy is the contract, and if outside papers are to be imported into it, this must be done in so clear a manner as to leave no doubt of the intention of the parties. *Farmers' Loan, etc., Co. v. Snyder, supra*; *Ins. Co. v. Southard*, 8 B. Monr. 634.

When there is doubt as to the intention of the parties to treat the paper as part of the policy, the courts gave the benefit of the doubt to the assured, and construe the policy liberally in his favor. *Stone v. U. S. Casualty Ins. Co.*, 34 N. J. L. 376. This is in accord with the general rule that the language of the policy being the language

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of the underwriters, if susceptible of two interpretations, that must be adopted which will sustain the claim of the assured, and give him the indemnity it was his object to secure. *Cropper v. Western Ins. Co.*, 32 Penn. St. 351.

The clause which appellee seeks in this case to have construed as part of the policy is not written or printed upon the same paper with the rest of that instrument, nor is it referred to in the policy as forming a part of the contract between the appellant and the insurance company. It is clear therefore that its conditions cannot be treated as entering into that contract if it is to be considered as a separate and detached paper. But the edge of the paper upon which the clause is printed is made, by means of mucilage, to adhere to a blank space on the face of the policy, and upon this single fact rests the whole claim of the appellee to have the clause considered as one of the warranties and conditions of that instrument. In the case of *Bean v. Stupart*, Doug. 11, these words were written on the margin of a marine policy of insurance: "Thirty seamen besides passengers." These words were held by Lord MANSFIELD to constitute a warranty that the insured ship sailed with that number of seamen, so that the policy would be avoided if a less number of seamen manned the vessel. He gave to the words the same effect as if they had been written in the policy itself. In the subsequent case of *Kenyon v. Buthen*, reported in a note to *Bean v. Stupart*, the same principle was announced by the same judge, and the words, "in port twenty-ninth of July, 1776," written transversely on the margin of the policy, were held to constitute a warranty which if not strictly complied with to a day would avoid the policy. In the subsequent case of *Pawson v. Bannell*, Lord MANSFIELD held that though a written paper be wrapped up in the policy, when it is brought to the underwriters to subscribe, and shown to them at the time, it is not a warranty or to be considered as a part of the policy itself, but only as a representation. He held the same thing in *Bize v. Fletcher*, in reference to the statements in a piece of paper wafered to the policy at the time the underwriters subscribed it. The statements on the papers in question in these two last cases were similar to those passed upon in *Bean v. Stupart* and *Kenyon v. Buthen*. In one case they related to the equipment of the ship in men and guns, and in the other to her condition as to repairs and strength, several particulars of the intended voyage being also mentioned.

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Thus a clear distinction is drawn by that eminent judge between statements and promises written in the policy itself, though upon the margin, and those detached from it, or contained in a separate piece of paper and made to adhere to the policy. In the former case they are warranties; in the latter they are at best no more than representations.

These cases are old, but we are not informed that they have ever been overruled. On the contrary they are cited with special approbation by some of the most respectable courts of the United States, and quoted by text writers as expressing the law of the present time. *Ins. Co. v. Southard*, 8 B. Monr., 637; *Farmers' Loan, etc., Co. v. Snyder*, 16 Wend. 492; *May Ins.* 162, 163; *Wood Ins.*, 416, 419.

These decisions may well be supported by the principles we have already announced. The underwriters prepare the contract to suit themselves. They can exact any lawful conditions they choose to guard against fraud, negligence, want of interest, etc.; but they must do so in a manner not calculated to mislead the parties with whom they deal. They have it in their power to express their meaning in a way not to be misunderstood, or to be capable of any other construction, except that which they must know the assured will give to the language. If they do not embody their warranties in the policy itself, or import them into that instrument by a proper reference to other papers in which they are contained, and the contract is capable of an interpretation which will make them mere representations, they must expect that it will be so construed.

But without attempting to decide that there are no circumstances under which a foreign paper attached to a policy, without any reference to it made in that instrument, may form a condition of the contract and be construed as a warranty, or that this clause might not have been attached to the present policy at such place and in such a manner as to give it that effect, we are clear that the clause under consideration is not so attached to the policy as to give it any higher dignity than that of a mere representation. It is placed after a description of the property insured, and in the midst of the covenants assumed by the underwriters, and makes the policy read thus: "The East Texas Fire Insurance Company of Tyler, Texas, organized January, 1875, in consideration of \$84 and of the agreement herein contained, does insure Goddard & Corley to the amount of \$1200: \$1000 on their stock of stoves and

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hollowware, tin, tinware and tinner's materials, and \$200 on their tools and machines, all while contained in the one story frame shingle roof building and shed adjoining on the east, occupied by assured and situated at No. 200, on Moore avenue, corner of Adelaide street, block No. 77, Terrill, Texas. Three-fourths loss and iron safe clause. It is agreed and understood to be a condition of this insurance that in case of any loss or damage under this policy this company shall be liable only for three-fourths of said loss, not exceeding the sum herein insured, the other one-fourth to be borne by the assured; and in event of other insurance hereon, this company to be liable only for its proportion of three-fourths of such loss or damage.

"It is understood and agreed that the assured shall keep a set of books showing a record of his or their business, including all purchases and sales, both for cash and on credit, as well as a copy of his or their last inventory, warranted to be kept in an iron safe at night, against all such immediate or proximate loss or damage by the assured as may occur by fire to the property above specified, but not exceeding the interest of the assured in the property and except as hereinafter provided," etc., setting forth the time the policy is to last, how the damage is to be estimated, the date at which the loss is to be paid, etc.

The policy then concludes by reciting the terms, conditions and warranties upon which it is given. It will be seen that the clause in question is inserted in the midst of a sentence with which it has no proper connection; a sentence which purports to contain the promises made on the part of the insurance company and not those entered into by Goddard & Corley. It is therefore not only out of place, but taken in connection with its context, is devoid of meaning. Not only so, but the policy expressly names the conditions and terms upon which it is executed, and the warranties which the assured is obligated to make good and perform, yet no warranty or condition of the kind stated in the clause in question is found among them.

Now there are some other principles of insurance law applicable to the state of case made by the policy as we have recited it. The first of these is: "Words purporting to be a condition upon which the policy was issued must be set forth in such a place, and in such manner in the policy, as leaves no doubt they were so intended, and words inserted promiscuously therein, having no connection with other conditions of the policy, although the word 'condition'

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is used, will not be treated as a condition of the policy." Wood Fire Ins., §§ 59, 60. See also May. Ins. 170.

This principle is well illustrated by the case of *Kingsley v. New England Mutual Fire Ins. Co.*, 8 Cush. 393: There the words "on condition that the applicant take all risks from cotton waste," inserted between the statement of the sum insured on the property and the description of its location, were held not to constitute a condition or warranty. The present case is much stronger than the one cited. There the words were written on the face of the policy; here they are printed on a slip and attached to it. There, though wrongly located, they do not interfere materially with the sense of the sentence in which they are embodied; here they do. There the word "condition" is expressly used in connection with the clause; here it is not. Moreover, whilst it is used in the preceding sentence fixing the liability of the company at three-fourths the value of the property destroyed, it is omitted in the iron safe clause altogether. This must have been done through design, and the design must have been to prevent the latter clause from being construed as a condition. However this may be, the policy is brought fully within the principle of law just announced, and the clause under decision must be held not to be a warranty.

There is still another rule of law applicable to this policy, which is that when an instrument of this character is inconsistent or ambiguous in its provisions, it must be construed most favorably for the assured. Wood Fire Ins., § 59, and notes; *Hoffman v. Aetna Ins. Co.*, 32 N. Y. 405; *Aetna Ins. Co. v. Jackson*, 16 B. Monr. 242; May Ins. 183, 184. The inconsistencies and ambiguities of this policy have already been made apparent. In the first part it recites certain undertakings assumed by the assured; and then in the latter part, which is held to be the most binding portion of such a contract, it sets forth specifically what are the terms of the policy which are to be considered conditions and warranties. To take the most favorable view for the appellee, the policy leaves it doubtful whether the promises exacted of the assured in the first part of the instrument are to be superadded as warranties to those enumerated in the last part, or whether the latter are to be considered the only warranties, leaving the former to be treated as representations. In such case, as we have seen, the doubt must be resolved in favor of the assured. The makers of the policy could have made their meaning clear by including the iron safe clause in

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the body of the policy at its proper place; but they have chosen to place it where its meaning and construction is obscured, and they must abide the consequences. We are of opinion that the court below should have held the clause in question to have been no more than a representation, and as it was not pleaded as such by the appellee, and the proof did not show any fraud committed by the appellant, or injury suffered by the company by reason of its not having been literally fulfilled, judgment should have been rendered for the appellant for the full amount claimed by him, the court having found that three-fourths of the value of the property lost was at least equal to the amount for which it was insured.

For the error of the court below in the matter stated, its judgment will be reversed, and this court, proceeding to render such judgment as should have been rendered below, orders and adjudges that the appellant recover of the appellee the sum of \$1,200, with interest thereon from November 30, 1885, and all costs of this and of the lower court.

Reversed and remanded.

BUZARD V. BANK OF GREENVILLE.

(87 Tex. 83.)

Partnership — part profits as compensation for services.

Where one furnishes money to be used in a certain business by the receiver for the former's benefit, the receiver to have part of the net profits as compensation for his services, this does not constitute them partners.*

ACTION on a note. The opinion states the facts. The plaintiff had judgment below.

B. S. Johnson and Perkins, Gilbert & Perkins, for appellant.

Mathews & Noyland, for appellee.

GAINES, A. J. The cause of action in the court below was a promissory note executed by one J. R. Pennington to appellee. Appellee originally sued Pennington alone, but by amendment made appellant a party defendant, alleging that the latter and Pen-

* See *Clifton v. Howard* (89 Mo. 192), 58 Am. Rep. 97, and note, p. 99.

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nington were partners in the cattle business, and that the note was given for a partnership debt of that firm.

The leading question in the case is whether a partnership existed between appellant and Pennington or not. The main facts in relation to this matter appear in the third, fourth, fifth, sixth and seventh findings of the court below, which are as follows:

“ Third. Shortly before the 2d day of June, 1883, the defendant Pennington made sale of nearly all the cattle he had so purchased, and put in the V brand for the sum of \$18,000, which sale he reported to defendant Buzard, and in compliance with the request of the latter, Pennington met Buzard at Denison, on or about the 25th day of June, 1883, and they there had a full and complete settlement of said business up to that date, showing that Pennington had in his hands \$16,500 of Buzard's money, for which he was accountable. Pennington had a portion of this in money with him, and a portion in drafts and deposit receipts, made out in the name of J. R. Pennington, which he then and there exhibited to defendant Buzard. Defendant Buzard then told Pennington that he had concluded to discontinue the business, as it was not profitable, but after some conversation it was then agreed between them that defendant Buzard was to advance to Pennington the \$16,500 which Pennington then had of his money, and that with the money thus advanced Pennington was to purchase cattle in Hunt and adjoining counties, and keep and take care of them, and sell them the next spring, unless a favorable opportunity for selling them should occur earlier. That the expenses of buying, keeping and selling such cattle should be paid out of the money so advanced, and that on final sale of cattle, defendant Buzard should receive back from the proceeds of sale the sum of \$16,500, advanced by him, if such proceeds amounted to that much, and that the net profits of the business, if any there was, should be divided equally between defendants Buzard and Pennington. If the proceeds of such cattle should not amount to the said sum of \$16,500, after deducting the amount paid for them, and expenses of keeping, etc., then defendant Buzard was to receive all such proceeds, and defendant Pennington was to receive nothing. It was further understood between them that said Pennington was to receive one-half of the net profits, as aforesaid, for his services in managing said business, in lieu of the salary he received under the prior contract. Said Pennington was not to share any possible losses further than, if there were no net

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profits, he was to lose the value of his services and labor. The cattle to be purchased under this agreement, were to be by Pennington put in the V brand, and he was to use his discretion in buying and selling and managing said business, except that defendant Buzard gave him general instructions not to pay over certain specified prices for certain classes of cattle, and not to sell same for less than certain specified prices. This agreement was verbal, and was acted upon by both parties. There was no agreement or instructions in whose name the business should be carried on. Defendant Buzard had the greatest confidence in the capacity and integrity of defendant Pennington. Defendant Buzard in entering into said agreement did not intend to, nor did he think he was entering into a partnership with said Pennington.

"*Fourth.* The defendant Buzard claimed the V brand. He was in Hunt county in May, 1883, but did not ascertain that said brand was recorded as Pennington's, nor did he make any investigations into the matter. He did not know in whose name the cattle business was carried on, but was aware that the money arising from the sales was deposited by Pennington in the latter's own name.

"*Fifth.* The note sued on was executed by J. R. Pennington in renewal of another note, which other note was executed for moneys advanced by plaintiff to him at various times for the purpose, as professed by Pennington, of carrying on said cattle business, which he was managing for himself and defendant Buzard, and the greater portion of the money so advanced was expended in the purchase of cattle which he put in the V brand. One thousand dollars of said money was advanced to Pennington to be used in the purchase of the Waldron pasture, which he said he was buying for himself and Buzard for the benefit of said cattle business, and was used in the purchase of said pasture.

"*Sixth.* Plaintiff, in making advances, did not rely on the responsibility of Pennington as it was aware he had little means of his own, but made them relying upon the fact that the defendant B. F. Buzard was interested in said business and knew the latter to be abundantly solvent, and made the said advances upon the representation of Pennington that the money was to be used in said business and believing it was to be so used.

"*Seventh.* The defendant J. R. Pennington frequently declared, after said money had been advanced to him, that he and defendant

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B. F. Buzard were partners in said business and drew drafts in the name of Pennington & Buzard in the transaction of said cattle business, though defendant Buzard had no notice or knowledge of said declarations or acts, nor had plaintiff such knowledge at the time it advanced the money to Pennington."

Upon this state of facts the court found, as a matter of law, that Buzard and Pennington were partners in the business in the transaction of which the note sued on was given, and this finding is assigned as error. Where one furnishes money to another under an agreement with the latter that he, as agent of the former, is to use it in a certain business and receive a part of the net profits of the business as a compensation for his services, does this constitute them partners as to third persons? This is the point presented and is one of the vexed questions of the law of partnership. The decisions of the courts of England and of this country bearing either directly or remotely upon the point, are numerous and conflicting and it is impossible to reconcile them. In its discussion, principles have been laid down which, as applicable to every case, do not solve it, and distinctions have been drawn which seem to be theoretical rather than sound. As an example of the former, it has been announced in many cases that the test of a partnership is whether the person entitled to a share of the profits has a direct interest in the profits as such, or has merely a claim against the other contracting party or parties for a sum of money equal to a part of the profits. It is true that a partner has a direct interest in the profits; and that a mere agent working for a part of the profits as a salary for his services, has simply the right to look to the profits only as a measure of his compensation. But in the absence of a direct stipulation in the contract upon this point (which rarely if ever appears in the cases presented), in many instances we can only determine whether such person has a direct interest or property in the profits as such or not by first deciding the question of partnership. It follows, that in order to apply this test in such cases, we must first ascertain that the parties are partners, or that they are not such, and thus beg the question at issue.

Let us look now to a distinction which has also been very generally recognized. It is held in numerous cases that one who is to receive a part of the profits of a business as a compensation for his services is a partner; but that if he is to receive a sum of money equal to a part of the profits he is not. This is usually applied to

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the question of partnership as to third parties. Logically there is a distinction. But to make a distinction in law it ought to be shown that there would be a difference in the two cases as to the rights and remedies of the third parties to be affected by the contract. But no such difference is apparent. The property to which creditors have the right to look for the satisfaction of their debts is the same whether the party is to receive a part of the profits or a sum equal to such part. He must, under either contract, necessarily receive the same sum. The result in the two cases is inevitably the same, unless we assume that one makes a partnership and the other does not, and thus take for granted the question to be decided.

The distinction between cases in which a compensation for services is given by a part of the gross profits, and those in which a part of the net profits are agreed upon for such services, is also recognized in the older decisions, but seems at a later day to have been somewhat questioned. Pars. Part. 88. This would seem however to rest upon a more substantial foundation, because a person agreeing to carry on a business for another for a part of the net profits accruing, risks his services in the venture, and in one sense at least may bear a loss resulting from it. These illustrations are sufficient to show the nature of the tests originally laid down to determine the question of partnership in doubtful cases, and would seem to account in part for the conflict of authority which has arisen from an attempt to apply them.

It is impossible to review all the cases bearing upon the question before us. An exhaustive analysis would extend beyond the limits of any ordinary opinion. Besides many of the volumes containing the decisions not being accessible to us, the attempt would be futile, even if it were deemed proper under other circumstances to make it.

As early as 1775 it was broadly laid down in England that "every man who has a share of the profits of a trade ought also to bear a share of the loss." In other words, that a community of interest in the profits of a business necessarily made a partnership. *Grace v. Smith*, 2 W. Bl. 998. This doctrine was affirmed in subsequent decisions in the English courts, and continued to be recognized as law in Westminster Hall for more than half a century. It was however overturned by the House of Lords in the case of *Cox v. Hickman*, 8 H. L. C. 268, and since that decision, has no longer been considered the law even there. The injustice of the rule that

a mere participation in the profits should make one absolutely a partner in the business was so fully seen that legislation was deemed necessary, so that the act of 28 and 29 Victoria C., 86, was passed, which contained this provision: "No contract for the remuneration of a servant or agent of any person engaged in any trade or undertaking, by a share of the profits of such trade or undertaking, shall of itself render such servant or agent responsible as a partner therein, nor give him the rights of a partner. We quote this distinct enactment because there is high authority for holding that it was merely declaratory of the common law. Pars. Part. *93; see also 1 Lind. Part. *42 — bottom 77; Ewell Ev. and 1 Wood's Collyer Part., §§ 31, 86.

Many cases involving the question, either directly or indirectly, have been decided by the American courts. It is generally held that a sharing of both profits and losses will constitute a partnership. So also it seems to be well established that an agreement to give a share of the gross profits in consideration of services will not render the parties to the contract partners either between themselves or as to third parties. Upon the question as to whether a participation in the net profits will necessarily constitute a partnership, there is serious conflict, the great weight of the later decisions being in the negative, and it is generally conceded by the courts which hold the affirmative, that if the contract is expressly for a sum equal to a proportion of the profits, this does not of itself create the relation of partners.

After a thorough discussion of the subject, Mr. Story thus states the law: "Admitting, however, that a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances, it remains to consider whether the rule ought to be regarded as any more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not of itself overcoming and controlling them. In other words the question is, whether the circumstances under which a participation in the profits exists may not qualify the presumption and satisfactorily prove that the portion of the profits is taken not in the character of a partner, but in the character of an agent as a mere compensation for labor and services. * * * If the participation in the profits can clearly be shown to be in the character of agent, then the presumption of partnership is repelled. In this

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way the law carries into effect the actual intention of the parties, and violates none of its own rules. It simply refuses to make a person a partner who is but an agent for a compensation, payable out of the profits, and there is no hardship upon third persons, since the party does not hold himself out as more than an agent. Story Part., § 37. In section 2 of chapter 6 of his work on Partnership. Mr. Parsons treats the question, where is a person liable to third persons as an actual partner? and fully discusses the various distinctions and tests which have been laid down, In a leading note to this section he thoroughly analyzes the principal cases. Hear the conclusion in the text. He says: "It must be however considered as now settled that a person paid for services rendered to a firm by a share of the profits, if this be given him only as a compensation for service, and he has no interest in the principal and no other interest in the profits, is not liable as a partner. Pars. Part. *92. The author refers to *Conklin v. Burton*, 43 Barb. 435, and the cases cited in his previous notes in the same section. The same author says that "It has been uniformly held, as in the English law, that mariners who receive for their wages a share in the profits of a voyage are not made partners, either as to rights or liabilities." Pars. Part. *76.

Now let us turn to the decisions of our own courts. In *Goode v. McCartney*, 10 Tex. 193, the court say:

"The evidence relied on to establish the alleged partnership was derived from the statement of the plaintiff, and he stated that Power was not his partner; and this statement accords with the legal conclusion deducible from his further statement that the proportion of the profits which Power was to receive was a compensation for his services as clerk. Such a participation in the profits would not constitute him a partner." It must be admitted however that the case was decided upon another point.

In *Cothran v. Marmaduke*, 60 Tex. 370, Cothran advanced money to a firm to be used in buying produce and was to have, as he testified, a portion of the profits of the business for the use of his money. He also stated it was a loan, and that the profits were in lieu of interest. He was held to be a partner. But the court distinguish this case from that of compensation to an agent and say: "The true distinction is that where a clerk or agent is to receive a fixed portion of the profits as a compensation for his time or labor, that he does this as clerk or agent and not as principal.

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For the partnership funds may be legally used in paying such clerk or agent for his time and services." However this may be, the court recognize the principle that an agent who receives a part of profits in lieu of a salary is not a partner.

In the case before us, Pennington was to receive one-half the profits of the business for his services: Buzard did not intend to make him a partner, but only an agent. Admitting that his understanding of the legal result of the contract would not change the law, if the contract of itself had made Pennington a partner, still the circumstances attending the agreement show its purpose. Pennington had been in his employment as an agent, working for a fixed salary. The contract had ceased and a settlement had just been had. The agent desired to continue in his service, to which he finally assented without change as to the nature and terms of the employment, except that instead of receiving a fixed salary he was to receive for his services one-half of the profits. We think Pennington continued an agent and did not become a partner. Applying to the contract the unsatisfactory test of "profits as profits," previously commented on in this opinion, we think it will appear that he had no direct interest in the profits, and was therefore merely the employee of appellant. To illustrate this, let us suppose that after purchasing a large number of cattle under the agreement they had risen rapidly in value so as to be worth largely more than their cost and the expenses incident to the purchase. The cattle in such case would represent both the capital and profits. But would Pennington in that event have had any property in them? It is clear we think that he would not. His right under the contract was, upon a settlement of the business to receive of Buzard compensation for his services to be measured by one-half of the profits, if any. We cannot detect any difference in principle between this and the master of a vessel claiming under a like contract with the ship-owners a part of the cargo for services, of whom Sir William Scott said: "I have no hesitation in pronouncing that these persons cannot be admitted to claim. They are to be considered as mariners, and their proportion of the proceeds of the voyage as their wages." *The Frederic*, 5 Rob. Admr. 8.

We have refrained from citing the cases in support of the principle here announced. With the exception of the very recent ones they are cited in the notes to the texts from which we have quoted. The following late cases are not referred to in these authorities,

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and are therefore cited here as being in point and directly sustaining the doctrine contended for. *Colwell v. Britton*, 59 Mich. 350; *Darrow v. St. George*, 8 Colo. 592; *Holbrooke v. Oberne*, 56 Iowa, 324; *Nicholaus v. Therlges*, 50 Wis. 491; *Beecher v. Bush*, 45 Mich. 188; s. c., 40 Am. Rep. 465; *Richards v. Grinnell*, 63 Iowa, 44; s. c., 50 Am. Rep. 727; *Ruddick v. Otis*, 33 Iowa, 402; *Ford v. Smith*, 27 Wis. 267. The important case of *Eastman v. Clarke*, 53 N. H. 276; s. c., 16 Am. Rep. 192, we have not before us, but from the syllabus in 2 Cent. L. J. 225, we take it not to be in conflict with the principle here decided.

It follows from what we have said that we are of opinion that the court erred in its finding of law; that the contract of June, 1883, between appellant and Pennington made them partners. This works a reversal of the case and renders it unnecessary to consider the other points presented by the assignments of error.

It is to be noted that the petition in this case seeks to charge appellant upon the proposition that he was the partner of Pennington, and does not seek to hold him liable upon the note on the ground that they were principal and agent. Hence we have not considered the question of appellant's liability by reason of the latter relation.

Under the averments as they stand, appellee in order to recover must prove a partnership and not merely an agency.

In order that appellee may take such further action in the case, by amendment or otherwise as may be deemed proper, we reverse the judgment and remand the cause.

Reversed and remanded.

BLAKE V. HAMBURG-BREMEN FIRE INSURANCE COMPANY.

(67 Tex. 100.)

Contract — by letter.

Where by agreement an insurance is to attach from the time of a deposit of a letter in the post-office, this implies a letter duly stamped.

ACTION on a contract for insurance. The opinion states the case. The defendant had judgment below.

Blake v. Hamburg-Bremen Fire Insurance Company.

Crank & Taliaferro, for appellant.

Hutcheson & Carrington, for appellee.

GAINES, A. J. At the time the transaction occurred which gave rise to this litigation, Cotton & Brother were agents representing appellee, and also a large number of other companies doing a business of fire insurance. O. L. Cochran at that time was also an agent of still other insurance companies. Being limited by his principals as to the amount of his risks, he was not able to meet in full the demands of his customers. A written agreement was accordingly entered into between Cotton & Brother, as agents of certain companies represented by them, on the one hand, and Cochran, as agent on the other, stipulating that the former would "cover surplus lines" of insurance for the latter on cotton in certain presses in the city of Houston.

The Insurance Company of North America, the "Traders" and appellee were each to carry insurance upon cotton in the International Press to the amount of \$5,000. It is evident from the written contract and the testimony on the trial, that by the agreement between these parties it was contemplated that when Cochran had a demand for more insurance than he could carry, he should designate by a memorandum in his office the companies named to which it should be apportioned and the amount allotted to each; and that when this was done, insurance to the amount so stated was to be considered effected in the respective companies for twenty-four hours, but no longer unless reported by Cochran to Cotton & Brother. There was also an agreement by Cochran with appellees to insure their cotton in the International Press, and it was understood between them that whenever after night appellants should mail a letter to Cochran notifying him of the amount of insurance desired, they were deemed insured for that amount, from the time the letter was so posted.

On the night of December 2, 1882, Cochran having received no application from appellants and anticipating that such might be made by letter as agreed upon, provided for it by designating by a memorandum in his office insurance for them to the amount of \$5,000 each in the Insurance Company of North America, and in the Hamburg-Bremen Company, the appellee in this appeal.

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About nine o'clock on that night appellee deposited in the post-office a letter addressed to Cochran notifying him to increase the insurance on their cotton in the International Press to the amount of \$10,000. This letter was not delivered until December 4.

It is claimed by appellee that it was not stamped when posted, and there was strong evidence adduced on the trial to support this conclusion.

Admitting, for the sake of argument, that no stamp had been placed upon the letter, the question arises was this such a compliance with the terms of the agreement between Cochran and appellants as to complete either a contract of insurance or a contract for insurance in this particular instance. A contract may be consummated by letters deposited in the post-office; and when an offer is made contemplating an acceptance in this manner, and a letter accepting it is properly mailed, the agreement is complete. *Adams v. Lindell*, 1 B. & Ald. 681; *Dunlop v. Higgins*, 1 H. L. O. 381; *Taylor v. Ins. Co.*, 9 How. 390. We know of no decision exactly in point upon the question of posting an unstamped letter; it is held however in *Maclay v. Harvey*, 90 Ill. 525, that an offer to be accepted by return mail is not assented to by delivering a letter to a messenger to be mailed, who fails to do this in the proper time. The cases are numerous, both in the English and American courts, which hold that if the offer contemplates an acceptance through the post-office, the contract is complete as soon as the letter is mailed accepting it. But in all these cases the letters were duly posted. That this is what is intended by such an offer, we think quite obvious, at least in the United States.

Our postal laws require a prepayment of postage before a letter can either be transmitted or delivered. Rev. Stat. U. S., arts. 3896, 3900, 3904. Without this, a communication addressed to another post-office will not be forwarded, and a dropped letter will not be delivered. How is it, then, in the case before us? If the letter was not prepaid, was the posting a compliance with the condition upon which the insurance was to depend according to the original agreement between Cochran and appellants? That it was not the act contemplated by them in making that agreement we think evident from the circumstances of the cases and the ends to be accomplished by the letter.

As a prudent business man, Cochran must have had two objects in view in agreeing to this method of effecting the insurance. One

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was to secure a delivery to himself of written evidence of appellants' application for insurance; the other to get prompt notice of the transaction, so that he might protect himself from liability by reporting the insurance to Cotton & Brother, and thereby keeping it in force.

We are cited by appellants' counsel to the Post-office Regulations, § 473, we presume for the purpose of showing that a person to whom an unstamped "dropped" letter is addressed may secure its delivery. Waiving the question whether we can take judicial notice or not of the regulations of the departments of the general government, we think it a sufficient answer to this to say that even under these rules great delay in the delivery of a letter is the probable result of the omission to prepay the postage. In this case we are not left to speculate upon this matter. The testimony shows that there was a delay of twenty-four hours at least before the letter was delivered, and that this was caused by the fact that no stamp had been placed upon it.

Now, let us suppose that the fire had occurred before the delivery of the letter and after the lapse of twenty-four hours from the time Cochran made the memorandum in his office, and that in the meantime he had received no notice that the letter had been mailed or of its contents. In such a case could appellee be held responsible, when by the terms of the contract made by its agents, the insurance was to expire if not reported in twenty-four hours? On the other hand, could Cochran be held liable for not reporting the insurance, when by reason of appellants' neglect he had failed to get notice of their application? We do not ask these questions for the purpose of answering them. That is unnecessary to the decision of this case. We propound them merely to show that it was a matter of the greatest importance to Cochran that the letter of appellants notifying him of their desire or application should have been properly mailed, and its delivery without delay and without additional expense to him thereby insured.

It follows from what we have said that in our opinion if the letter of appellants was not stamped when it was deposited in the post-office, the terms of the agreement in regard to notice by a mailed letter were not complied with. If this be the case, then the "surplus" of insurance, which Cochran's memorandum was designed to cover, had not been applied for; and the contingency had not arisen which could alone authorize him to bind appellee by a

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designation in his office. Cotton & Brother's agreement was to "cover surplus lines of insurance" for him — not to insure cotton in advance before he had an application for the insurance. By keeping in view these conclusions the assignments of error are not difficult of determination.

The first assignment of error is in substance that the court erred in its charge to the jury in construing the written contract between Cochran and Cotton & Brother. It is not necessary for us to decide whether the interpretation given in the first sentence of the instructions be correct or not. It appears from the subsequent part that the jury were authorized to find for appellants in either of three events: First, if appellants mailed the letter to Cochran on the night of December 2, duly stamped; second, if they notified Cochran of having mailed the letter and of its contents before the fire; and third, if Cotton & Brother had authority to issue the certificate after the fire. Certainly this was all appellants could claim under the evidence adduced on the trial; and whether the abstract proposition construing the contract contained in the charge be correct or not, appellants were not prejudiced by it.

By the second and sixth assignments of error it is complained that the court erred in its charge in reference to the authority of Cotton & Brother. If no binding contract of insurance had been effected upon the cotton up to the time of the fire, it certainly cannot be contended that the court should have charged the jury, as a matter of law, that they had authority to ratify the attempted contract and issue the certificate. As we understand the charge, the court correctly instructed the jury to look to the evidence in order to determine the scope of the authority of these agents. If by the several agreements that had been made and the acts of appellants under them, a valid contract of insurance had been completed before the loss, then it was a matter of no moment whether the certificate was issued or not; appellants were entitled to recover without it. But if no such contract existed at the time of the fire, Cotton & Brother, merely as agents to effect insurance, had no authority to issue the certificate.

From what has already been said, it is not necessary to consider the fourth assignment, which is to the effect that the court erred in instructing the jury that an unstamped letter deposited in the post-office was not sufficient notice to Cochran under his and appellants' agreement. This assignment is not well taken. Nor do we

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think the court erred in charging the jury that notice to Cochran after the fire commenced was not sufficient to bind appellee.

It is not a case of two parties making a contract of insurance upon property already lost, agreeing to date it from a past day, both being, at the date of the contract, ignorant of the loss. When the notice was given the fire was in progress, and appellants knew it.

The seventh assignment of error is, "that the court erred in refusing the charges asked by plaintiff." The charges asked are three in number. Such an assignment is not in accordance with the rule, and according to the uniform line of decision in this court, will not be considered.

The refusal of the court to permit appellants to show by witnesses Cotton and Cochran why more of the insurance designated by Cochran on December 2 was allotted to the Traders' Insurance Company, is also assigned as error; but this, if error, did not prejudice appellants' case. The record shows that the case was tried without any reference to that company, and in the charge the liability of appellee is not made to depend, in any respect, upon the fact that that company was a party to the original contract between its agents and Cochran. Appellants therefore were not prejudiced by the ruling of the court excluding the testimony.

The ninth assignment is that the court erred in overruling the motion for a new trial. The main grounds of this motion raised the other questions already passed upon, and need not be discussed further.

Because we find no error in the judgment, it is affirmed.

Judgment affirmed.

GULF, COLORADO AND SANTA FE RAILWAY CO. V. REDEKER.

(67 Tex. 190.)

Parent and child—action for injury to child employed in dangerous business.

To sustain an action by a father for an injury to his minor child employed in a dangerous business without his consent, the defendant must be averred and proved to have known of the minority.

ACTION for negligent injury to plaintiff's minor child. The opinion states the case. The plaintiff had judgment below.

Gulf, Colorado and Santa Fe Railway Co. v. Redeker.

Davis, Beall & Rogers, for appellant.

W. McLaury and Ball & McCart, for appellee

GAINES, A. J. Appellee brought this suit in the court below, alleging in substance that appellant, without his consent, employed his minor son, J. W. Redeker, as a brakeman on its road, and while so employed the son was injured through the negligence of appellant, and that thereby appellee lost his services and was put to expense, etc.

The charge of the court is assigned as error, and in so far as it relates to appellee's right to recover, is as follows: "You are instructed that the law is, the father is entitled to the services of his minor son during minority, and the minor son cannot, without the consent of his father, make legal contracts; nor without such consent, either before or by acquiescence after knowledge of the father, engage in business for himself. If you believe that J. W. Redeker was at the time of the injuries a minor under twenty-one years of age, and that he, without his father's consent or knowledge, had engaged himself to defendant company, and whilst so engaged received the injuries alleged in the plaintiff's petition, then the plaintiff will be entitled to recover."

By these instructions the liability of appellant is made to depend upon its employment of the son without the father's consent and his consequent injury, without reference to the question of knowledge of the son's minority on the part of the company's agents or of any subsequent negligence.

There can be no question, that if the injury was the result of negligence, as alleged in the petition, the father was entitled to a judgment for damages for loss of service and incidental expenses accruing from the injury. *H. & G. N. R. Co. v. Miller*, 49 Tex. 322. We are also of opinion that where one knowingly engages a minor in a dangerous employment without the father's consent, and the minor is injured in such employment, he is responsible to the father for any consequent loss of the son's services to him. This is clearly decided by the Kentucky Court of Appeals in a recent case. See *Louisville, etc., R. Co. v. Willis*, 21 Cent. Law Jour. 57.

This is the rule, when the minor is employed by another with the parent's consent, and without such consent is put by his em-

ployer at a more dangerous business and thereby receives an injury, the father may recover. *Railroad Co. v. Fort*, 17 Wall. 553. And we can see no reason why one less stringent should be applied, in case the minor is knowingly engaged in a perilous occupation in the first instance against the parent's will. But the question arises as to the responsibility of the employer when he does not know of the minority of the person whom he employs. This is the controlling question in determining the correctness of the charge complained of in this case.

The fact is to be borne in mind that this is not a suit to recover of appellant the value of the services rendered by the minor. It is to recover for the loss of services and expenses, etc., resulting from the injury. The testimony shows the son's wages have been paid. A parent or master whose child or apprentice has been employed by another without his consent, may recover the value of his services, although the employer may not have known of the relation existing between them. This is founded upon the theory that the employer having received the services, there is an implied contract on his part to pay their value to the party to whom they belong. In *Lightly v. Clanston*, 1 Taunt. 112, Lord MANSFIELD says: "It is not competent for the defendant to answer that he obtained that labor, not by contract with the master, but by wrong, and therefore he will not pay for it."

The case approaches as near as possible to the case where goods are sold and money has found its way into the pockets of the defendant. See also *Foster v. Stewart*, 3 M. & S. 191; *Hill v. Allen*, 1 Vesey, Sr., 83; *Menton v. Hornsby*, 1 Vesey, Sr., 48; 1 Chitty Pl. 100; *James v. LeRoy*, 6 Johns. 273; *Trengott v. Byers*, 5 Conn. 480; *Railroad Co. v. Showers*, 71 Ind. 451. In such a case the question of notice is not material. But where the father sues in tort as for enticing away or harboring his minor child, the rule seems to be clearly established that he must aver and prove that the defendant knew of the minority. *Caughey v. Smith*, 47 N. Y. 241; *Butterfield v. Ashley*, 2 Gray, 254; 6 Cush. 249; 6 Bac. Abridg., Master and Servant, O, 550; 2 Chitty Pl. 645 and 646, n. 1. This, in our opinion, is also the rule applicable to the case when the father sues for damages resulting to him from the employment of his son in a dangerous business without his consent. If the employer knows of the minority, it is his duty to ascertain whether the infant have a parent or be an apprentice, and if so, to obtain

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the consent of such parent or the master before making the employment. If he does not, he acts at his peril.

But suppose the minor is approaching his majority and that his appearance does not indicate that he is under age, then is one who engages his services in a dangerous occupation to be held liable at all events for an injury resulting from that employment to one having an interest in his services of which he was wholly ignorant? We think not. The injustice of such a doctrine is apparent. It is also contrary to a sound policy which should encourage the employment of those who must labor to live, and we have not found it supported by the authority of analogous cases.

We find nothing in the case of *Louisville Railroad Co. v. Willis*, to which we have been referred, and which we have cited above, in conflict with the proposition, that before the employer can be held liable he must have notice that the son is a minor. The minor in that case was but sixteen years old, and the court in their opinion say: "The conductor knew from his appearance that he was under age, and he received him and used him."

In the case before us the son at the time of his employment by the appellant was over nineteen years of age, and we think it cannot be assumed as a fact that his appearance would necessarily indicate his minority. Hence we think to enable the appellee to recover without proof of subsequent negligence on part of appellant, it should have been shown by direct evidence that the minor was known to the company's agents to be such, or that his appearance was such as necessarily to indicate that fact. The charge of the court, which is admirable for its clearness and brevity, authorizes the jury to find for plaintiff upon the mere fact of the employment and consequent injury, although the conductor may not have known the son was a minor. In this we think there was error that calls for the reversal of the judgment.

The assignment that the court erred in not charging the jury upon the question of emancipation we think not well taken. The testimony showed that the son had, previous to his employment by the appellant, been engaged with the father's consent as a fireman on another railroad; and that he had regularly paid his wages to his father; and that on this occasion he left home without his father's consent. There is nothing to show that the father had given him his time or had turned him away to earn his own living in his own way. There being no fact proven from which the jury

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had the right to infer emancipation, it was not error to fail or refuse to charge upon the subject.

Because of the error in the charge pointed out above, the judgment is reversed and the cause remanded.

Reversed and remanded.

COHEN V. CONTINENTAL FIRE INSURANCE COMPANY.

(67 Tex. 325.)

Insurance — waiver of forfeiture by demand of payment.

A policy of insurance, forfeited by non-payment of premium, is not reinstated by mere demand of payment of the premium.

ACTION on a fire insurance policy. The opinion states the facts. The defendant had judgment below.

Kirwin, Gardner & Etheridge, for appellant.

Hutcheson, Carrington & Sears, for appellee.

GAINES, A. J. Plaintiff's application for insurance contained the following clause: "It is also covenanted and agreed, that if default is made in payment at maturity of any one of the installments of premium to be paid as stipulated in premium note given herewith, the whole amount of all the installments, remaining unpaid in said policy, shall become immediately due and payable and the policy of insurance issued hereon, shall cease to insure, and said Continental Insurance Company shall not be liable for any loss or damage which may accrue to premises insured thereunder, during such default, nor until such policy shall be revived by written consent of the superintendent of said company's south-western department, or by an officer of said company on payment to him of all amounts due thereon."

The policy issued in accordance with this application contained the following provision: "This company shall not be liable for any loss or damage under this policy if default shall have been made in the payment of any installment of premium due by the terms of the installment note." It was also stipulated that the policy should become void if the insured should neglect to pay the premium. The policy also refers to the application and to the

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premium note. It was to continue for five years and was dated March 12, 1883. A cash premium of \$8 was paid upon delivery of the policy and a premium note for \$32 executed, payable in installments of \$8 each on the 1st day of March of the years 1884, 1885, 1886 and 1887 respectively.

The first installment was not paid, and on the ninth of November next after it matured, the property insured was destroyed by fire. In order to arrive at the effect of the provision for a forfeiture of the policy, plaintiffs proved that after the installment fell due, one Bridges, an agent of the company, frequently made demand for the premium upon blanks of the company issued for that purpose; that on one occasion he added "unless you pay now you will be without insurance," and that about the middle of October he sent another demand, and wrote that if the premium was not paid by the twenty-fifth of that month it would be collected by an attorney or through the bank. Plaintiffs were ready and willing to pay the note, had it been presented by a bank or an attorney. Bridges was agent of the company to solicit applications and to receive and transmit premiums; but Dargan & Trezevant were the company's superintendent for the south-western department, and as such issued policies applied for, as they saw fit.

There can be no doubt that an insurance company, through its authorized agent, may contract by parol for the renewal of a policy, although it may be stipulated on the face of the instrument itself that this shall not be done. There is no peculiar sanctity attached to such provision in contracts of this character which makes them an exception to the general rule that parties to an agreement may, by mutual concurrence, change its terms at any time after its execution so as to meet their pleasure or interest. A contract of insurance may be by parol, and its terms may be changed by parol, by mutual assent. It has accordingly been held, in numerous decisions, that though a policy be forfeited by the failure to pay the premiums according to its conditions, yet an agent, duly authorized, may waive the forfeiture, and thereby reinstate the obligation. The cases go even further, and decide that the authority of the agent may be implied from a previous waiver of a former forfeiture of the same policy, or from a general custom of such agent to exercise such power over the contracts of the company. *Ins. Co. v. Norton*, 96 U. S. 234; *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410;

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Homes v. Phila. Life Ins. Co., 61 Penn. St. 107; *Bowman v. Ins. Co.*, 59 N. Y. 521; *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 148; *Trustees, etc., v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305.

It may also be considered as settled law that when a policy provides for a forfeiture upon failure to pay premiums which are to fall due, but does not stipulate that upon such failure the overdue premiums shall be considered as earned, a demand and payment of such premium constitutes a waiver of the forfeiture. *Joliffe v. Madison Mutual Ins. Co.*, 39 Wis. 111.

This is upon the principle, that in such case, the insurance and the premium are obligations which depend each upon the other, and hence that a receipt of the latter necessarily implies that the insurer recognizes or renews the original contract, and thereby assumes the continuance of the risk. It is manifestly just that if he takes payment of the premium, which is but the consideration of a contract of insurance on his part, he should be held responsible for the loss if any occurs. Such is not the case, however, when the contract is that upon the default in any installment, the insurance shall cease and the installment shall be considered as earned. Then the insurer has the right to the premium although the insurance is forfeited, and hence a demand and payment of the premium is not held as a waiver. *Gorton v. Dodge County, etc., Ins. Co.*, 39 Wis. 121.

We have found no case which goes to the extent of holding that merely a demand of the payment of the overdue premium, without its payment, is sufficient to reinstate a policy which is forfeited. Such is however the contention of appellants in the case before us.

We will briefly notice some of the cases which have been cited in support of that position: *Insurance Company v. Norton*, 96 U. S. 234, was a suit by appellee upon a life insurance policy on the life of her husband. There was a default on the last premium which fell due before the death of the assured; but her case was, that after it had matured, and before the death, an agreement had been entered into between the agent of the company and the assured, that the time of payment should be extended, and that before the extension had expired the premium had been tendered. It was proved on behalf of appellee, that the agent who made the transaction had been accustomed to take notes and extend the time of payment, and that the company had ratified his acts. The majority of the court held, that these facts were sufficient to reinstate the

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policy and that there was sufficient evidence of them to go to the jury and to warrant their finding. Three of the judges dissented.

In the *Chicago Life Ins. Co. v. Warner*, 80 Ill. 410, - the premium fell due June 28. On the first of that month the company wrote to the assured that he would be entitled to a dividend on the twenty-eighth. The premium was not paid on the twenty-eighth and on the twenty-ninth he died. On July 2 the company wrote the assured that if he wished to continue the policy, to remit the amount of the premium by return mail. The balance of the premium, after deducting the dividend, was tendered a few days thereafter. The court held that there was no forfeiture, putting the decision upon the ground that the retention of the dividend, under the circumstances, was to be deemed a part payment of the premium and that this was a waiver of the forfeiture. Two of the judges who concurred in the decision did not concur in the ground upon which it was placed. They considered the letter as showing an election on the part of the company to continue the policy in force.

Now it will be seen that in the former case there was an express agreement for an extension, by a duly authorized agent, and a tender before the extension expired. In the latter case the five judges who concurred in the opinion held virtually that the company received part of the premium, and thereby waived the forfeiture. We have found no case going further than these in support of the position taken by appellants.

If the appellants in this appeal had paid the premium upon demand, they would have had a very different case; and if the authority of the agent to receive the payment had been shown, or the company had ratified this act, by appropriating the money or otherwise, we should think him clearly entitled to recover. But here was no payment, or tender of payment, nor any agreement, either before or after default, for an extension of time. Bridges, who was certainly agent for certain purposes, did make demand and did threaten to put the claim out for collection, and it would seem that he contemplated that the insurance should continue if the money was paid.

But it nowhere appears that they ever indicated by any act that they desired to pay the premium and continue the insurance, or ever, in any manner, agreed to do so. The fact that they were ready and willing to pay on October 25, the date at which Bridges

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threatened to put the note out for collection, we think can make no difference. There is no act of theirs before the loss occurred from which it can be inferred that they had any desire to continue the contract with the company; on the contrary, it is rather to be presumed that they were utterly indifferent whether the policy was continued in force or not.

It is said in *May on Insurance*, § 362, and in *Wait's Actions and Defenses*, volume 4, page 57, that a demand, and even a suit brought, for an overdue premium is no waiver of a forfeiture.

Both authors cite in support of this proposition the case of *Edge v. Duke*, 18 Law Jour., chap. 183.

This case we have not been able to examine, the volume not being accessible to us. See *Gorton v. Dodge Co. Ins. Co.*, *supra*; *Roehner v. Knickerbocker Ins. Co.*, 63 N. Y. 160; *Pill v. Berkshire Life Ins. Co.*, 100 Mass. 500; *Baker v. Union Mut. Life Ins. Co.*, 43 N. Y. 83. We think therefore that appellant's position, that there was a waiver in this case, cannot be maintained, even if it had been shown that Bridges had authority to reinstate the contract after forfeiture. This agency however was by no means established. The courts, in order to prevent forfeitures in such cases, have frequently held slight circumstances sufficient to warrant them in finding such authority to exist. The evidence in this case is that Bridges was merely the agent to receive applications and to collect premiums, and that he had no authority to make contracts of insurance. There was no evidence that he had granted any previous extension. The circumstance that he made demand on the company's blanks may tend to show his authority for this purpose. But we cannot say the judge below erred if he held this insufficient.

There are no findings of fact in the record, and we have to give every intendment to the judgment. So that unless it should be held that the judge below found against the weight of evidence upon the question of Bridges's agency, the judgment should not be reversed.

We are therefore of opinion that there is no error in the judgment, and it is affirmed.

Judgment affirmed.

City Bank of Sherman v. Weiss.

CITY BANK OF SHERMAN V. WEISS.

(51 Tex. 331.)

Bank — indorsement for collection — claim by collector on proceeds.

The defendant received a draft indorsed to his order "for collection on account of the City Bank of Houston." The prior indorsements showed that it had been remitted to that bank for collection on account of the plaintiff bank. The defendant collected the draft. The City Bank of Houston failed, indebted to the plaintiff and the defendant. *Held*, that the proceeds belonged to the plaintiff.

ACTION for money had and received. The opinion states the case. The defendant had judgment below.

Hal. W. Green and Brown & Gunter, for appellant.

O'Brien & Johns, for appellee.

GAINES, A. J. On December 17, 1885, appellant remitted to the City Bank of Houston for collection a draft drawn by one Kent on the Texas Tram and Lumber Company for \$222.58, having first indorsed it as follows: "For collection and credit for account of the City Bank of Sherman, C. O. Jones, Cashier." On the eighteenth day of the same month the City Bank of Houston indorsed the draft as follows and sent it to appellee: "Pay V. Weiss or order for collection for account of City Bank of Houston. B. F. Weames, cashier." On the last-named day appellant remitted another draft for \$201.60, drawn by the same drawer upon the same drawee, which also reached appellee through the same channel with like indorsements upon it. The City Bank of Houston failed. Appellee collected the money upon both drafts, upon the first before, and upon the second after he was apprised of the failure.

The Houston Bank was indebted to both appellant and appellee, and appellee credited the proceeds of the collections to the account of the latter bank and refused to pay appellant. Appellant brought suit and the cause was submitted to a jury, who returned a verdict for appellee. The court rendered judgment accordingly and overruled appellant's motion for a new trial.

The assignments of error relied upon in the brief, all relate to the action of the court in giving and refusing instructions. It is

complained that the general charge was misleading in this, that it made the liability of the appellee to depend upon the question whether he was the agent of appellant in collecting the draft or the agent of the City Bank of Houston, and did not instruct the jury as to the legal effect of the restrictive indorsements upon the drafts. It is also assigned that the court erred in refusing charges asked by appellant to the effect that these indorsements were notice to appellee of appellant's ownership of the paper, and that if the former collected them he was responsible to appellant for the amount so collected.

When one places negotiable paper with a bank for collection and that bank sends it to another for the same purpose, whether the second bank is to be considered the agent of the owner or merely the agent of the bank, is a vexed question. Important legal consequences flow from its determination and upon it the authorities are conflicting. If the second bank be held agent of the owner, then it would be responsible to him for any negligence which resulted in a loss of the debt. So also if the collecting bank failed after receiving the money, being in good credit at the time the paper was transmitted for collection, the bank which had sent it would not be liable to the owner for the amount collected. But if, as many authorities hold, the second indorser is to be considered merely the agent of his immediate indorser and not of the first indorser, these consequences do not follow, and in case of negligence or default, the first indorser is liable to the owner of the bill and not the second. These principles are well illustrated by the authorities which have been cited by counsel for appellee. In *Allen v. Merchants' Bank of New York*, 22 Wend. 215, the defendant bank had received the draft for collection and had transmitted it to a bank in Philadelphia, through whose negligence it had been lost. Defendant was held liable for the loss. In the case of *Montgomery County Bank v. Albany City Bank*, 7 N. Y. 459, the decision was to the same effect, and it was also there held that the bank to which the bill had been sent in the second instance was not liable to the owner for its own default. Virtually the same doctrine was held in *Reeves v. State Bank of Ohio*, 8 Ohio St. 466. In *Kent v. Dawson Bank*, 13 Blatchf. 237, a draft was sent for collection to the defendant bank upon a party in Washington, North Carolina. Defendant sent it to bankers in that place then in good standing, who collected it, and becoming insolvent failed to pay over the money. The defendant was held responsible.

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In Pennsylvania the same principle was applied to a company of mercantile agents, and they were held liable to the owner of a claim given them for collection by the failure of an attorney to whom they had sent it, who collected and retained the money. *Bradstreet v. Everson*, 72 Penn. St. 124; s. c., 13 Am. Rep. 665. All these cases are based upon the principle that the last collector to whom the paper is sent is the agent of the bank or agency who sends it, and not of the owner. They therefore hold that the first indorser who receives the bill for collection is the owner's agent and takes the bill under the implied contract to be responsible, notwithstanding the negligence or default of the agent whom he may employ.

The case of *Hoover v. Wise*, 91 U. S. 308, follows the Pennsylvania case above cited, and holds that the attorney to whom a collecting agency has sent for collection a claim belonging to another is not the agent of the owner. The opinion however admits a great conflict of authority upon even that proposition.

It will be seen that the case before us presents quite a different question. It is whether a banker who has received from his correspondent a draft indorsed for collection, which is indorsed in like manner to his correspondent, can collect the paper and appropriate the proceeds to the latter's debt to him and refuse to pay the owner. It is not necessary to decide that he is the owner's agent in order to determine that he cannot do this. He has received the owner's money, knowing by the indorsements upon the draft that it is his and will not be permitted to withhold it from him.

The authorities in support of this proposition are overwhelming. The following cases from courts of high authority are directly in point: *Sweeney v. Easter*, 1 Wall. 166; *Cecil Bank v. Farmers' Bank of Maryland*, 22 Md. 148; *Sigourney v. Lloyd*, 8 B. & C. 622; 5 Bing. 525; *Trenttel Nat. Bank v. Barandon*, 8 Taunt. 100; *Blaine v. Bourne*, 11 R. I. 119; s. c., 23 Am. Rep. 429; see also *White v. Nat. Bank*, 102 U. S. 658; *Hook v. Pratt*, 78 N. Y. 371; s. c., 34 Am. Rep. 539; 1 Dan. Neg. Inst., §§ 336, 698 *et seq.*; Story Prom. Notes, § 143.

The only case holding the contrary doctrine is *Hyde v. First Nat. Bank*, 7 Biss. 156. The court seemed to consider that it was constrained to its decision by the principle decided in *Hoover v. Wise*, *supra*, and claimed that opinion was in conflict with the former decisions of the same court in *Sweeney v. Easter*, before cited. An examination of the two cases will show that there is no conflict

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between them, and the opinion in *Hoover v. Wise* recognizes none, and although there it contains an elaborate discussion of the authorities, it does not name the case of *Sweeney v. Easter* for the obvious reason, as we think, that the two decisions were dependent upon wholly different principles.

The question before us is not one of agency. A party may be held liable as a trustee of another, or for the conversion of his money, though not an agent. The proposition which determines the rights of the parties here, is that appellee collected appellant's money, knowing it to be such, and must be held to have received it for appellant's use and benefit.

Because the court below did not charge the jury to this effect, the judgment is reversed and the cause remanded.

Reversed and remanded.

GALVESTON CITY RAILROAD COMPANY V. HEWITT.

(67 Tex. 473.)

Railroad—street—duty toward child on track.

A street railway company is bound to exercise the highest degree of diligence to discover and avoid injuring a young child on its track.*

ACTION for negligent personal injury. The opinion states the facts. The plaintiff had judgment below.

F. Charles Hume, for appellant.

M. E. Kleberg and *E. D. Cavin*, for appellee.

STAYTON, A. J. The charge of the court complained of in the second assignment was correct, and there was evidence which made the charge applicable to the case. The appellee, a child nineteen months of age, was seen on the track of appellant's street railway, in advance of an approaching car, which ran over him. Whether the driver saw the child does not appear, but the inference, from the fact that he did not stop the car until he had reached the next corner after running over the child, is that he did not.

* See note, 88 Am. Rep. 637.

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The only person who testified in the case saw the accident at the distance of about one hundred feet from the approaching car, saw the child on the track between himself and the car, and gave a warning cry of danger, which was unheard or unheeded. The driver was on the car, but whether at his post or inside of the car is left in doubt. The animal drawing the car seems to have seen the danger, which the driver ought to have seen, and ran off to one side of the track.

The accident occurred in a public street about four or five o'clock on a bright afternoon. The charge given without request made the right of the appellee to recover to depend upon the fact that his injury resulted from the negligence of the driver, and it assumed no fact. It informed the jury that "negligence is the want of such care and prudence as prudent persons observe under similar circumstances, and negligence is a question of fact to be proved just as any other fact," and that the burden of proving its existence rested upon the plaintiff.

At the request of the defendant the court gave the following instructions: "If you believe from the evidence that the plaintiff was injured by being run over by the car, you will find for defendant unless it appears to your satisfaction that the running over of the plaintiff by the car was by reason of the negligence of the driver.

"If you believe from the evidence that the plaintiff was injured, but do not believe that such injury resulted from the plaintiff being run over by the car, you will find for the defendant."

The brief and argument for appellant assert that the charge "absolutely assumes, presupposes, that the plaintiff was injured by the defendant, and that the injury was due to defendant's negligence." The charges contain no such assumptions and are remarkably free from such defects.

At request of counsel for appellee the court instructed the jury as follows: "The jury are instructed that it was the duty of the defendant company to exercise the highest degree of diligence toward a child of tender years and without discretion, and that slight negligence would make defendant company liable in damages." This charge is assigned as error.

Since the case of *Coggs v. Bernard*, three degrees or grades of negligence with their equivalent grades of diligence have been recognized by English and American text-writers, and by the

courts; but however correct in theory the classification may be, the utmost difficulty has been found by the courts in applying it to the ordinary affairs of life; and many of the most learned have regretted their recognition, while all in the actual adjudication of cases have more or less ignored the classification. While to the mind of the learned jurist, trained to theoretical refinements and capable of making nice distinctions, grounds on which the grades may stand may be perceived, yet the same minds, when called upon to apply the theories to the facts of given cases, will be unable to fix the point in fact at which the one grade ceases to exist, and another begins.

Theories which cannot be given a practical effect, even by those most skilled in technically correct theorizing, certainly ought not to be given much weight in the adjudication of the multifarious affairs of life, which must be conducted through persons of ordinary intelligence largely without any theoretical or technical learning.

When a person inadvertently omits or fails to do some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of the employment in which the person is engaged, then such an omission constitutes actionable negligence, if as an ordinary or natural sequence it produces damages to another.

The omission may be classified as gross or slight negligence or simply as negligence, or as failure to use the highest, ordinary or slight degree of diligence, but the legal obligation at all events, to make compensation to the injured person exists if the omission was a breach of duty and the proximate cause of the injury. What facts will constitute that diligence which the law requires, must depend on the circumstances of each particular case. The omission must be considered in relation to the business in which the person whose duty it is to exercise care is engaged.

If the business be one hazardous to the lives of others, the care to be used must be of a nature more exacting than required where no such hazard exists; the greater the hazard the more complete must be the exercise of care.

The exercise of that care requisite to the discharge of a legal duty toward an adult person of intelligence and not wanting in physical ability to take care of himself, if exercised toward a child of tender years, wanting in intelligence and ability to take care of itself, would often amount to what is usually termed gross

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negligence. A railroad carrier of passengers may, without subjecting itself to the charge of negligence, permit an adult passenger to pass and repass from one passenger car to another while in motion, or to select his own seat or position in a car, if there be not some danger in the position not open to the observation of the passenger; but were an infant of tender years and without discretion, travelling with its parents, to escape from their control and to attempt to do the same things, it would evidently be the duty of the servants of the carrier, if they knew of it, to restrain the acts of the infant in these respects or any other from which injury to it was likely to result; and a failure to do so would be negligence, which would render the carrier liable for any injury that might result from such neglect.

It is frequently said that a carrier of passengers is bound to exercise a high degree of care for their safety; and that for an injury resulting to them from what is termed negligence or slight negligence, the carrier will be liable; and that the duty to exercise extreme care results from the contract of carriage, express or implied. This is true, but it is not the whole truth, for the duty arises from the hazardous character of the business, and the fact that human life is imperiled by it. The contract creates the relation of carrier and passenger, but that is not the main source from which springs the duty of the carrier to exercise a high degree of care.

It has sometimes been said that a carrier owes no duty to persons other than passengers and employees, other than that it must not intentionally, willfully or wantonly injure them. This doctrine has not been sanctioned in this State.

Ordinary railway companies, running cars propelled by steam, have the exclusive right to the use of their tracks, except at such places as they are intersected by public crossings or such private ways as they may permit, and they may therefore expect that no one will violate this right, and may rely upon a clear track, but it is very generally held, that notwithstanding this, such is the hazardous nature of the business in which they are engaged, it is the duty of such carriers, and not only for the safety of their passengers, but for the safety of any one who may be on the track, to keep a lookout. Street railways have no exclusive right to the use of the part of the street covered by their track, but all persons have the right to use the street for the purposes for which streets are

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ordinarily used, and from this fact such companies may expect that other persons will use the street, as they have the right to do; and it is therefore incumbent upon them to ascertain whether the track be clear.

This duty the law casts upon them as one of the conditions on which they are permitted to use streets, which to some extent they divert from the more ordinary uses, for the private advantage of the carrier, as well as the public convenience. This duty is as firmly fixed on this ground, and upon the ground of the hazardous character of such a business conducted in the street of a town or city, as is the duty of the carrier of passengers by steam, fixed by the hazard of that business to human life, or by the contract for carriage.

If a person be seen on the track of either class of railway, it may be assumed, if the person be an adult, that he will leave the track before the train or car reaches him, and this presumption may be indulged so long as danger does not become imminent, but no longer. From the time that danger is seen to be imminent it becomes the duty of such a railway company to use the highest degree of care to arrest it, and a failure to do so will constitute culpable negligence, which may or may not fix liability, as that question may be affected by the contributory negligence of the injured person. No such presumption however can be indulged as to the prudent conduct of an infant of no greater age than was the plaintiff at the time he is alleged to have been injured.

It may be assumed, as matter of law, that it is the duty of a street railway company to know that the track in advance of its car is clear, and that it will be liable for any injury resulting from the want of this knowledge, unless its liability is defeated by the contributory negligence of the injured person, or unless it appears that the person injured went upon its track at a place so near the approaching car that the driver, by the exercise of care, could not avoid the injury after the person was seen or might have been seen. This involves the proposition that such a railway company is bound to use such diligence as will enable it to know whether the track in front of its car is clear, and if to this end the exercise of the highest degree of diligence is necessary, it must be used.

If it be seen that a person is on the track of such a railway company, in advance of its car, it must use such care as will avoid injury to such person, if this can be done, and for failure to do so

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it will be liable for the injury resulting, unless such liability is defeated by the contributory negligence of the injured person. The care requisite to avoid injury in such a case embraces every degree. The charge of the court must be considered in relation to the facts of the particular case.

In the case before us, the uncontroverted fact is that the child was on appellant's track in advance of the car. Whether it was seen by the driver is not shown, but we concur in the opinion of counsel for appellant, after a careful examination of all the evidence, that the driver did not see it. It was his duty to exercise the highest degree of diligence to ascertain whether persons were on the track in advance of the car; and in so far as the charge complained of affects this question, it was correct. If the driver saw the child on the track in advance of the car, it was his duty to exercise all the diligence then possible to avoid injury to it; and in this aspect of the case the charge was not erroneous.

It is insisted that "the reasonable and probable conclusion is that the child placed itself suddenly on the track immediately in front of the car, so that he was not discernible by the driver; or being discernible, was seen too late to enable the driver to avert the catastrophe;" and that "this inference is strengthened by the further fact * * * that the mule drawing the car ran off to one side of the track. The child must have placed himself suddenly and immediately in front of the mule, so near that the momentum of the car hurried it over him and concealed him from the view of the driver at the very moment of the animal's abrupt rearing to one side." Whether this was so was for the jury to determine. If however, such was the fact, it was still proper that the appellant should have been held to that degree of care required by the charge; under which the jury may have come to the conclusion, even though the child suddenly entered upon the track but a short distance in front of the car, that the injury might have been averted had the driver used such care as the charge required, after the child was seen or ought to have been seen.

[Omitting questions of fact.]

Judgment affirmed.

Weis v. Devlin.

WEIS v. DEVLIN.

(97 Tex. 507.)

Contract — to repair building — destruction by fire.

Under a contract to furnish materials and perform labor in altering an existing structure, according to agreed specifications, with no provision as to time of payment, if the structure is destroyed by fire, without the fault of either party, when the work has been only partly performed, the builder may recover *quantum meruit*.*

ACTION for work and materials. The opinion states the case. The plaintiff had judgment below.

Davis & Davidson, for appellant.

Geo. P. Finlay, for appellee.

STAYTON, A. J. It appears that some time prior to September 1, 1885, the appellant desired to have alterations and repairs made on his dining-room, which did not involve the entire reconstruction of that part of the house on which he desired work done. He caused specifications and general designs of the work desired to be done to be drawn by an architect and designated as "Designs for remodeling of dining-room in residence of Albert Weis, Esq.". Through the architect he sought bids from the builders and mechanics for the work, plans and specifications being given.

The appellee made two propositions to do the work and furnish the material, which were as follows:

"GALVESTON, September 1, 1885.

"Mr. N. J. CLAYTON, *Architect*:

"The undersigned will agree and contract to remodel house for Mr. Weis, as per plans and specifications and details [meaning those referred to in said Exhibit A] made by you at the undermentioned figures, to-wit:

"For all work and material except that contained in painter's specifications, using openings as they are at present \$798 00

* See note, 36 Am. Rep. 436.

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"Or with all new openings in the dining-room to correspond with details, I to take all openings, grates and mantels for..... \$850 00

"Respectfully,
 "(Signed) HARRY DEVLIN."

The proposition to furnish the material and do the labor for \$850 was accepted, and the greater part of the material necessary and labor to be done went into the building before the thirteenth of November, 1885, at which time the entire building, without fault of either party, was destroyed by the great fire which then occurred in Galveston. There was no agreement as to the time when the payment for the material and labor should be made.

This action was brought to recover for the material furnished and the labor done, and the court instructed the jury as follows:

"If you believe from the evidence that the agreement between plaintiff and defendant was that the plaintiff was, for the sum of \$850, to do the work and furnish the materials, all at his own expense, and repair the L of defendant's building according to the plan and specifications in evidence, and that the plaintiff, in accordance with the contract, had done a part of the work and had attached a part of the materials to the building, but that before the completion of the contract the building and all the materials on hand were destroyed by the great fire of November 13, 1885, without the fault of either party, then your verdict should be for the plaintiff for such a pro rata part of the contract price as the work and materials wrought into the building bears to the entire work and materials contracted for," etc.

There was a verdict and judgment in favor of the appellee for \$500 and interest on that sum from November 13, 1885.

The defendant denied his liability under the facts, and as a further defense urged that it was the duty of the plaintiff to have taken out insurance, and that his failure to do so was such negligence as would defeat his right to recover. The court excluded evidence tending to show that it was usual for builders to take out what are termed "builder's risks," and it was urged that this was error. We are of the opinion that there was no error in this ruling.

That the builder, for his own protection, might have taken insurance, in no way affects his right to recover; nor could the fact that the builder may have had such a right in any way prevent the

owner from taking such insurance on his own property as he might deem necessary for his own protection. If a builder be willing to trust to the solvency of the person for whom he does work and furnishes material, the latter has no right to thrust upon him the burden of insuring property on which he does work.

It is well settled that if one undertakes to furnish the material and build a house or other structure for another, the same to be paid for when the work is completed, that the builder cannot recover for the partial construction in case the structure be destroyed without fault of either party; and this rule applies when the structure is such as to make it, from day to day, as erected, a part of the land to which it is intended to be permanently attached as well as to a structure chattel in its nature. This rule has its foundation in the fact that it remains possible for the builder to complete the structure though in an unfinished state it be partially or wholly destroyed, and he is therefore left under the full obligation of his contract.

In such a case though the structure may have been so attached to the land as to become a part of it, and therefore the property of the owner of the land, the maxim, *res perit domino*, has not been given effect.

In the case before us the appellee undertook to furnish material and to perform labor to complete an entire job. The thing to be done however consisted in making alterations in an existing thing, which in the nature of things was impossible after the thing to be altered was destroyed; unless the owner saw proper to restore the house to the condition in which it was before the alteration began or at the time of its destruction. This he did not elect to do, and it was not the duty of the plaintiff to do so. Had this been done it may be that the plaintiff ought not to recover until he completed the work he undertook, and that the maxim would not apply.

It is said that "it is very clear, at the common law, that if the thing of the employer, on which work is done and for which material is furnished, is by accident, and without any fault of the workman, destroyed or lost before the work is completed or the thing is delivered back, the loss must be borne by the employer, and he must pay the workman a full compensation for the work and labor already done and material found, although he has derived no benefit therefrom." Story Bailm. 426a, citing *Menthone v. Alhauer*,

3 Burr. 1592, and *Gillett v. Mawman*, 1 Taunt. 137. It is difficult to tell from an examination of these cases whether the labor and material embraced an entire job which a contract had been made to complete.

The author intimates an opinion however that one contracting to do work and furnish material on a thing by the job for a stipulated price, would not be entitled to recover compensation *pro tanto* for his labor and material applied to it if the thing be destroyed before completion, and cites the cases of *Appleby v. Myers*, L. R., 2 C. P. 651, and *Brumby v. Smith*, 3 Ala. 123. These cases support the rule, but notwithstanding the high character of the courts by which they were decided, we are not, under the former decisions made in this State, prepared to follow them. On this question there has been great difference of opinion.

In *Hollis v. Chapman*, 36 Tex. 1, it appeared that a carpenter had contracted to furnish the material and do the woodwork on the defendant's brick buildings, then in course of construction, for a specified sum, but before the buildings were completed the houses were destroyed by fire without fault of either party. In an action by the carpenter to recover for material furnished and labor done by him, it was held that he was entitled to recover.

In *Cleary v. Sohler*, 120 Mass. 210, it appeared that a person contracted to lath and plaster a building at a named price per square yard, and that he had done the greater part of the work when the building was destroyed by fire without fault of either party. In disposing of the case the court said: "The building having been destroyed by fire without fault of the plaintiff, so that he could not complete his contract, he may recover under account for work done and material furnished." *Lord v. Wheeler*, 1 Gray, 282; *Wells v. Calnan*, 107 Mass. 514, 517; s. c., 9 Am. Rep. 65. The contract in that case made no provision as to time when the work should be paid for, and it was no less entire in its nature than it would have been had the agreement been to furnish the material and do the work for a gross sum.

In the case before us the completion of the work agreed to be done had become impossible from the destruction of the house to be altered and repaired, and the work and material furnished were represented by the alterations and improvements so far as made, which had become the property of the defendant, and it would seem that the case is one in which the maxim *res perit domino* may

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find just application. The cases which hold that a recovery cannot be had in such cases are made to rest largely on the entirety of the contract, and the holding in the particular jurisdiction that apportionment cannot be made.

The tendency of recent decisions has been to ameliorate that rule, and in this State it has long ceased to be recognized.

As was said in *Carroll v. Welch*, 26 Tex. 149, which arose on a contract to do the entire woodwork on a building "according to the modern decisions and the decisions of this court, the rule appears to be that if the employee abandons his contract the employer shall be charged with only the reasonable worth, or the amount of benefit he has received on the whole transaction, and in estimating the amount the contract-price cannot be exceeded. The former is allowed to recover for his part performance its reasonable worth, not to exceed the contract-price, and the latter to recoup or recover his damages for the breach of contract by the former. When the employee is discharged without cause, or is prevented by the employer from completing the performance, he is entitled to recover for the part-performed and the damages he has sustained by breach of contract by the employer. If both parties have broken the contract or there has been a mutual abandonment of it by both parties, the employee is entitled to recover the reasonable worth of the services he has rendered the employer."

If such be the rule, even in case of violation of contract, the employee certainly cannot be denied a recovery when by inevitable accident he has been prevented from performing the contract. The case of *Gonzales College v. McHugh*, 21 Tex. 257, which was a case of builder's contract, the rule in this State is further illustrated. *Hillyard v. Crabtree*, 11 Tex. 264, was a case arising on a builder's contract, entire in its nature, which the employee was prevented from completing by his sickness, and the same rule was enforced. "If a contract which is entire, after part performance, is rescinded by the mutual consent and act of the parties as to the residue; or the further performance is prevented by law, or the act of God, without the fault of either party, the contractor may recover on a *quantum meruit* for what he has done. In such case neither party is in fault, and therefore is not responsible to the other for failing to fulfill the entire contract. In a recovery on a *quantum meruit* there is an apportionment of so much of the agreed compensation to the contractor as he has earned in what he has

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done; he recovers such part of the entire compensation as is equal to the part he has performed of the entire contract." 2 Suth. Dam. 507. This was the rule of the civil law. 1 Domat, 533.

The measure of damages given by the charge was in accordance with what we understand to be the recognized rule. *College v. McHugh*, 21 Tex. 257; *Hollis v. Chapman*, 36 Tex. 3; 2 Suth. Dam. 504; Field Dam. 332-333.

The last assignment of error is "the court erred in refusing to give the several charges asked by the defendant, numbered respectively one, two, three and four, set out in the record."

The assignment points out no specific matter of error and cannot be considered.

There is no error in the judgment, and it will be affirmed.

Judgment affirmed.

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CASES
IN THE
SUPREME COURT
OF
MISSISSIPPI

CRUM V. STATE.

(84 Miss. 1.)

Criminal law — homicide — deceased's neglect of wound.

On a trial for murder, the court charged that if death ensues from a wound inflicted in malice, but not in its nature mortal, but which is neglected or mismanaged, the defendant must be held guilty, unless it clearly appears that the neglect and mismanagement were the sole cause of the death.*

CONVICTION of manslaughter. The opinion states the case.

D. S. Fearing and Wells & Williamson, for appellant.

T. M. Miller, attorney-general, for State.

COOPER, C. J. It appears in evidence that the appellant on the 4th day of July, 1884, shot one Ford, inflicting upon him a very dangerous wound. Ford was treated by a physician for some days and discharged with a warning from the physician that his condition required great prudence on his part. Ford was imprudent, and on the 2d of September died from inflammation of the bladder, which, the attending physician states, was shown by a *post-mortem* examination to have been a result of the wound.

On the trial, the court, at the instance of the State's attorney, gave two charges (the first and third), to which exception was

* See *State v. Bantley* (44 Conn. 537), 26 Am. Rep. 486.

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taken by the accused. It is only necessary to state the third instruction, since that announced the law more strongly against the defendant than the first. It is as follows: "If death ensues from a wound given in malice, but not in its nature mortal, but which being neglected or mismanaged, the party dies, this will not excuse the party who gave it, but he will be held guilty of murder, unless it clearly and certainly appears, either by the evidence offered on the behalf of the State or the defendant, that the deceased's own neglect and want of care, and not the wound itself, was the sole cause of his death; for if the wound had not been given the party had not died."

In *Mr Beth v. State*, 50 Miss. 81, an instruction practically the same as the one here given, in the view in which it was considered by the court, was declared to be erroneous.

In that case the facts as given by the court were, that a dangerous but not necessarily fatal wound in the abdomen had been inflicted, the cut penetrating so deep that the entrails protruded. One Patrick, not a physician, had administered chloroform, replaced the bowels, and sewed up the wound. The physician who subsequently attended the wounded man testified that Patrick's treatment was not good, saying that the wounded man died about sixty hours after the wound was inflicted, as he supposed, from inflammation of the bowels; that in his opinion death was caused by the wound, and that wounds in the abdomen were dangerous but not necessarily fatal.

On these facts the court said: "If there be misgovernment on the part of the medical attendant, from ignorance or inattention, this would form no exculpation if the wound was mortal. Arch. Cr. Prac. and Plead. 262. But if the wound were merely dangerous, and the bad treatment the proximate and immediate cause of the death, the result would be different."

For the proposition that for a dangerous wound resulting in death from mismanagement, the party inflicting could not be held liable for murder, no authority is cited either by the court or by counsel in that case. Nor has counsel in his brief in the case now before us cited one, nor has our own investigation discovered that there are any. On the contrary, the decisions seem to be uniform and numerous in support of the instruction given by the court below, which is almost a literal copy of the law as given by Greenleaf on Evidence, vol. 3, § 139.

Delk v. State.

We have examined many of the cases cited by Greenleaf in support of the text, and others may be found in Roscoe's Cr. Ev. 717, 718 and 719. As we have said, they support the instruction given in this case, and so far as we are advised are in conflict with no other case than that of *McBeth v. State*. The principle of these cases is that one who maliciously inflicts a serious injury upon another, from which injury, as the mediate but not immediate cause, he dies, is responsible for the death. It is a salutary rule, necessary for the protection of society by the punishment of offenders, and ought not to be departed from. *McBeth v. State*, is overruled in so far as it announces a different rule, and the judgment of the lower court is affirmed. *Judgment affirmed.*

DELK V. STATE.

(68 Miss. 77.)

Criminal law — larceny — lucri causa — asportation.

The prisoner went secretly and unlawfully to the stable of another, led therefrom a jack belonging to the latter, and when fifteen or twenty feet from the door of the stable, killed the jack and left it lying on the owner's premises. *Held*, larceny.*

CONVICTION of larceny. The head-note states the facts.

J. P. Walker, for appellant.

T. M. Miller, attorney-general, for State.

ARNOLD, J. There is no error in the instruction for the State, and the fifth instruction asked by appellant was properly refused.

The doctrine is well settled in this State that it is not necessary to constitute larceny that the taking should be *lucri causa*. A fraudulent taking and removal of the personal property of another with intent to wholly and permanently deprive the owner of the same is larceny. *Warden v. State*, 60 Miss. 638; *Hamilton v. State*, 35 Miss. 214; 2 Bish. Crim. L., § 758; *Williams v. State*, 52 Ala. 411.

It was not necessary that the animal stolen should have been removed from the premises of the owner. To remove him with

* See *Wilson v. State* (18 Tex. Ct. App. 270), 51 Am. Rep. 309, and note, 812.

Hanover National Bank v. Klein.

the requisite felonious intent from one part of the premises to another, or from the spot or house where he was found, was a sufficient asportation. 2 Bish. Crim. L., §§ 794, 806; 3 Greenl. Ev., § 154.

On the facts shown it was not error to overrule the motion for a new trial.

Judgment affirmed.

HANOVER NATIONAL BANK V. KLEIN.

(64 Miss. 141.)

Partnership — payment of individual debt from firm assets — rights of creditors.

A member of an insolvent firm may, with the consent of his partner, use the assets of such firm to pay premiums on a policy of insurance on his life for the benefit of his wife, to whom he is in good faith indebted, and partnership creditors cannot set aside the transaction unless they show fraud.

BILL to subject life insurance policies to plaintiff's claim. The head-note shows the point. The defendant had judgment below.

Calhoon & Green, for appellant.

Shelton & Crutcher, Birchett & Gilland and J. D. Gilland & A. B. Pittman, for appellee.

ARNOLD, J. It is but the reiteration of well-settled principles, by no means peculiar to Mississippi, to affirm that the right of copartnership creditors to have assets of the firm applied first to the payment of firm debts is a rule of administration adopted and exercised only by courts of equity when they are called upon to administer the affairs of a partnership, and that the equity of firm creditors in this behalf is a derivative one, growing out of the right of the partners as between themselves to do the same thing, and that if the partners for any cause could not enforce such right as between themselves, the creditors of the firm cannot do so. *Schmidlapp v. Currie*, 55 Miss. 597; s. c., 30 Am. Rep. 530; *Loeb v. Morton*, 63 Miss. 280; *Case v. Beauregard*, 99 U. S. 119; *Fitzpatrick v. Flannagan*, 106 U. S. 648.

In this view of the law, the decree below is readily affirmed. Appellants had no lien on the funds of the firm sought to be

reached by the bill, and these funds had been converted by John A. Klein to his own use, with the knowledge and consent of his partner, before the bill was filed. These funds therefore did not then belong to the partnership, and neither of the partners could at that time have insisted that they should be applied to the satisfaction of firm debts. The equities of the partners as to the particular funds had been extinguished by their joint act, and consequently the derivative equities of creditors were at an end. There was nothing upon which the equities of creditors could then operate, and no case for the application of the rule invoked, unless the disposition of the funds was rendered invalid as to creditors by the alleged insolvency of the firm or the fraud of the parties.

There is no testimony as to the insolvency of John A. Klein or the firm until the failure in November, 1883. It is true that the insolvency of both prior to that time is alleged in the bill upon information and belief, but this is denied on information and belief in the answer of Mrs. Klein, and appellants were thereby put upon proof of the allegation. Whatever may be the value of such answer as evidence, it at least required proof by appellants. 1 Dan. Ch. Pl. and Pr. 844, note 7; 846, note 1; *Bultrick v. Halden*, 13 Metc. 555; *Dugan v. Gittings*, 3 Gill. 138; s. c., 43 Am. Dec. 306; *Drury v. Conner*, 6 Har. & J. 288; *Watson v. Palmer*, 5 Ark. 501; *Lawrence v. Lawrence*, 21 N. J. Eq. 317.

If it be said that the matter of the insolvency of the firm may fairly be presumed, without a charge to that effect, to have been in the personal knowledge of George M. Klein, who adopted the answer of Mrs. Klein, and that the insolvency, by such answer, was admitted by him, the obvious reply is, that his answer is not evidence against his co-defendant. She had not adopted or referred in any manner to his answer as being correct, nor was she so connected with him as to be bound by his confessions, admissions or declarations, and the general rule therefore prevailed that the answer of one defendant is not evidence against another. 1 Dan. Ch. Pl. and Pr. 841, note 7; *Hardesty v. Jones*, 10 Gill. & J. 404; *Blakeney v. Ferguson*, 14 Ark. 640; *Christie v. Bishop*, 1 Barb. Ch. 105; *Salmon v. Smith*, 58 Miss. 399.

But the insolvency of John A. Klein, or the firm, or both, if shown, would not, on the facts of record, change the rights of the parties. An individual debtor, whether solvent or insolvent, may unquestionably, under the laws of the State, make preference among

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his creditors, or pay one or more, to the exclusion of the rest, if it is done in good faith, and without the reservation of any benefit to himself, or make *bona fide* sale of his property without violating the legal rights of creditors, and a partnership or the members thereof, whether solvent or insolvent, may do the same. The law imposes no restrictions on the power of a partnership or its members as to the acquisition or disposition of property which are not common to other persons. *Schmidlapp v. Currie*, 55 Miss. 597; s. c., 30 Am. Rep. 530; *Sigler v. Knox Co. Bank*, 8 Ohio, 511; *Case v. Beauregard*, 99 U. S. 119; *Roach v. Brannon*, 57 Miss. 490.

The application of the funds of the partnership by John A. Klein, with the consent of his partner, to the payment of premiums on insurance for the benefit of his wife, to whom, it is admitted, he was largely indebted, was *prima facie* valid, and it devolved upon appellants to show that it was fraudulent. *Kimball v. Thompson*, 13 Metc. 283; *Case v. Beauregard*, 99 U. S. 119; *Parkhurst v. McGraw*, 2 Cush. 134. They failed to do this, and there was no cause for relief.

Judgment affirmed.

SANGSLAFF V. STIX.

(64 Miss. 171.)

Sale — stoppage in transit — delivery to agent.

S. shipped goods by railroad to R. at A. station. When the goods arrived there R. paid the freight charges, receipted for the goods, and told the company's agent that he would leave the goods with him until he could send for them. Thereupon L., a creditor of R., attached the goods. Afterward the agent received notice from S. not to deliver the goods to R. *Held*, that it was too late for S. to exercise the right of stoppage in transit. (*See note*, p. 51.)

CLAIMS to personal property. The head-note states the facts.

Sweatman, Trotter & Trotter, for appellants.

J. W. Pinson, for appellees.

ARNOLD, J. The right of stoppage *in transitu* is favored in law, and may be exercised at any time until the goods have come into the actual or constructive possession of the buyer, or as otherwise

expressed, the right may be exercised as long as the goods remain in the possession of the carrier as carrier.

Where the right of stoppage exists it is paramount to the claim of judgment or attaching creditors of the vendee, and it cannot be divested by the goods being levied on under execution or attachment in favor of such creditors. *Morris v. Shryock*, 50 Miss. 590.

No particular mode is prescribed by law for the assertion of the right, but to do so effectually it is essential that the vendor shall, before the goods are delivered to the vendee, give notice to the carrier or person in the immediate custody of the goods not to deliver them, and if a servant has the custody of the goods, and notice be given to his principal, it must be in time to enable him with reasonable diligence to prevent a delivery to the vendee. 2 Kent Com. 544, n.; Benj. Sales, § 860.

These conclusions are not disputed here, but it is insisted by appellants that the right of stoppage was defeated by a constructive possession of the goods by the vendee before notice was given to the carrier or person in the immediate custody of the goods to stop them; and before the attachment was levied, and in this position the law is with the appellants.

It was said by the court in *Whitehead v. Anderson*, 9 Mees. & Wels. 517, that a constructive possession by the vendee which supersedes the right of stoppage exists "when the carrier enters expressly or by implication into a new agreement, distinct from the original contract for carriage, to hold the goods for the consignee, as his agent, not for the purpose of expediting them to the place of original destination, pursuant to that contract, but in a new character, for the purpose of custody, on his account, and subject to some new or further order to be given to him."

We accept this as a true and approved interpretation of what is meant by constructive possession, in a contest between the vendor and vendee or attaching creditors of the vendee, when the right of stoppage *in transitu* is involved. Benj. Sales, §§ 846, 849; 2 Kent Com. 545; *Lickbarrow v. Mason*, 1 Smith Lead. Cas. 1202, 1244, 1245.

The application of the principle to the facts of record here is fatal to appellee.

In the case before us the goods were not in the possession of the carrier, as carrier, when they were attached. They had reached their destination by rail and the liability of the carrier, as carrier;

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had been terminated by the acts of its agent and the vendees. The payment of the freight and the receipt for the goods by the vendees and leaving them in the railroad depot until they were sent for by the vendees, constituted the railroad company the agent of the vendees, not for the transportation, but for the custody of the goods. *Benj. Sales*, §§ 846, 849, 856; 2 *Kent Com.* 545; *Lickbarrow v. Mason*, 1 *Smith Lead. Cas.* 1202, 1244; 1245.

Judgment reversed.

NOTE BY THE REPORTER.—See *Calahan v. Babcock*, 21 *Ohio St.* 281; *s. c.*, 8 *Am. Rep.* 63.

Benjamin says (*Sales*, 1077, § 1254): "The question and the sole question for determining whether the *transitus* is ended is in what capacity the goods are held by him who has the custody? Is he the buyer's agent to keep the goods? or the buyer's agent to forward them to the destination intended at the time the goods were put in transit?"

"Goods are liable to stoppage as long as they remain in possession of the carrier, *qua carrier*. *Benj. Sales*, § 1247.

In *ex Parte Cooper*, 11 *Ch. Div.* 68, it was held that "the *transitus* is not at an end so long as the carrier continues to hold the goods as a carrier. It is not at an end until the carrier, by agreement between himself and the consignee, undertakes to hold the goods for the consignee, not as carrier, but as his agent." To the same effect, *McPetridge v. Piper*, 40 *Iowa*, 627; *Harris v. Pratt*, 17 *N. Y.* 249. In the last case it was held that "the transit continues until the goods come to the possession of the vendee or of some agent authorized to act in respect to the disposition of them otherwise than by forwarding them to the vendee."

Story says (*Sales*), § 837: "In all cases however where the goods remain in the hands of a carrier, the circumstances must distinctly show that he holds them in a new character, as special bailee of the custody; and if the consignee suffer them to remain in his hands under circumstances which show no express or implied agreement on the part of the carrier to hold them specially on account of the vendee, or which do not indicate clearly that no immediate better possession by the vendee is contemplated, the vendor will still retain a right of stoppage."

In *Innes v. Lane*, 57 *N. H.* 454, the consignors of goods, sold upon credit, sent them by rail to the place of destination. Upon their arrival the car containing the goods was set out upon a side-track where, according to custom, the goods were to be taken from the car immediately by the consignees, or if not so taken, were liable to be charged \$2 a day demurrage. There was no agreement or understanding between the carriers and the consignees that the goods should be held by the former as warehousemen, or as agents of the consignees. The consignees, who were insolvent, absconded before the arrival of the goods. The consignors first learned of the insolvency of the consignees after the goods were forwarded. A general truckman, who had a standing order from the consignees to take any goods he might find at the railroad sta-

tion and bring them to the consignor's store, was informed by an agent of the carriers of the arrival of the goods but did not remove them. The next day the goods were attached by the defendant. The truckman was appointed keeper of the goods by the attaching officer and removed them under his directions. *Held*, the consignor's right of stoppage *in transitu* was not terminated at the time of the attachment, and they might maintain trover against the attaching officer for the value of the goods. The court said:

"The essential ground of the right of lien is possession; that of stoppage *in transitu* is non-delivery to the vendee. There may doubtless be a valid constructive delivery without actual tangible possession by the vendee,—and 'in the variety and extent of dealing, which the increase of commerce has introduced, the delivery may be presumed from circumstances, so as to vest a property in the vendee.' A destination of the goods by the vendor to the use of the vendee,—marking them or making them up to be delivered, or removing them for the purpose of being delivered, may all entitle the vendee to act as owner, to assign, and to maintain an action against a third person, into whose hands they have come. But the title of the vendor is never entirely divested till the goods have come into the possession of the vendee. He has therefore a complete right, for just cause, to retract the intended delivery, and to stop the goods *in transitu*.' Lord LOUGHBOROUGH, in *Mason v. Lickbarrow*, 1 H. Bl. 364; *Williams v. Moore*, 5 N. H. 235.

"In the case of *Hunter v. Beale*, cited in *Ellis v. Hunt*, 3 Term R. 466, Lord MANSFIELD was clearly of opinion, that though the goods might be legally delivered to the vendee for many purposes, yet as for this purpose there must be an absolute and actual possession by the bankrupts, they must have come to the corporal touch of the vendees, otherwise they may be stopped *in transitu*. But in *Ellis v. Hunt*, Lord KENYON said: 'As to the necessity of the goods coming to the corporal touch of the bankrupt, that is merely a figurative expression, and has never been literally adhered to. For there may be an actual delivery of the goods without the bankrupt seeing them, as a delivery of the key of the vendor's warehouse to the purchaser.' And in *Dixon v. Balduen*, 5 East, 184, Lord ELLENBOROUGH also disapproved of the ruling of Lord MANSFIELD in *Hunter v. Beale*, saying: 'The question is, whether the party to whose touch the goods actually come, be an agent so far representing the principal as to make the delivery to him a full, effectual, and final delivery to the principal, as contradistinguished from a delivery merely to a person acting as a carrier or means of conveyance to or on account of the principal, in a mere course of transit toward him.' 1 Pars. Cont. 603, and cases cited. So demanding and marking the goods by the vendee's agent at the inn where the goods arrived at their destination, has been considered a constructive delivery, defeating the right of stoppage *in transitu*. *Ellis v. Hunt*, before cited.

"But delivery to a mercantile house merely for transmission to the vendee by a forwarding house does not take away the right of stoppage. *Hays v. Merrill*, 14 Penn. St. 48.

"The possession of a carrier is not such actual possession of the vendee or consignee as takes away the right of stoppage. 'This,' said LAWRENCE, J., in *Bothlingk v. Englis*, 3 East, 895, 'has been repeatedly determined.'

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" And if goods are shipped for a particular port, or forwarded to a particular place, thence to be sent by another ship or other conveyance to the vendee, and a wharfinger or a middle-man receives them on their first arrival for the purpose of forwarding them to the vendee, the vendor's right of stoppage continues until the goods have reached the possession of the vendee. *Mills v. Ball*, 2 Bos. & Pull. 457; *Ellis v. Hunt* and *Atkins v. Colby*, before cited.

" In such circumstances it might happen that it would be proper and necessary to submit to the jury such questions as whether the wharfinger or middle-man received the goods as the vendee's agent, to take possession of them for his benefit as owner, or as his agent only to forward them to him, or to keep them for the vendor. *Houston Stop.* in *Trans.* 122; *Reynolds v. Railroad*, 43 N. H. 580.

" If the wharfinger or middle-man, or any other person, be the actual agent of the vendee, beyond the duty and position of such person as a mere wharfinger, carrier, or forwarder, the possession of such agent would be as effectual a bar to the right of stoppage as the actual manual possession of the vendee. *Dixon v. Baldwin*, before cited; *Harman v. Anderson*, 2 Camp. 243; *Lucas v. Dorien*, 7 Taunt. 279; *Atkins v. Colby*, before cited; *Houston Stop.* in *Trans.* 114.

" Applying these principles, what is the condition of the case before us? It is conceded that the vendees were insolvent, and that this fact became known to the plaintiffs after the shipment of the goods. It is not contended (and upon the facts it cannot be) that the Cheshire railroad were the agents of the vendee for the purpose of receiving the delivery or possession of the goods. While standing upon the Surrey track they were still in the possession of the carrier, undelivered, and in a state of detention by the railroad, according to their custom and contract with reference to demurrage. Demurrage is a condition of detention and delay beyond the ordinary time for unloading or delivery. See *Bouv. Law Dic.*

" In this condition of the goods it is not claimed that there was any understanding or agreement that the railroad corporation should hold them as warehousemen or agents of Barnes & Co. The case of *Smith v. Railroad*, 27 N. H. 86, cited by the defendants, is therefore not in point. *Naylor v. Dennie*, 3 Pick. 198.

" Howland was a 'general truckman,' and notwithstanding he had had a general order to take any thing he might find for Barnes & Co. at the depot and bring it to the store, that order cannot be said to have continued after the store had been abandoned and all its contents removed, the traders having absconded. Moreover, the case finds that there was no evidence of any authority in Howland to act as the agent of Barnes & Co. for the purpose of taking possession of the shingles; and it was admitted at the trial that in taking possession of them and removing them he acted under the direction of the attaching officer, and not as agent of Barnes & Co. Barnes & Co. having no agent to receive or forward the goods, having themselves departed to parts unknown, the ultimate destination of the goods being unaccomplished and unknown, it can, in no sense, be considered that the goods had come to the possession of the vendees.

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"Such being the facts as proven or admitted, and no exception being taken to the instructions of the court upon the subject of constructive delivery and possession, I fail to discover any error in the proceedings of the court below, and am clearly of opinion there should be judgment upon the verdict."

In *Hall v. Dimond*, 68 N. H. 565, the court said: "No part of the goods was formally delivered to Sanborn. The rule of the railroad, known to Sanborn, required the payment of freight before the goods were delivered; but prior to the reception of the goods in controversy, the agent had allowed him, after goods consigned to him were deposited in the freight-house, to take a part or all without any formal delivery, intending to collect the freight while goods of sufficient value to secure it remained in the possession of the railroad; but this was not always done, as he had previously paid his freight bills promptly on demand. Occasionally Sanborn left his goods in the depot a few days after he had paid the freight. The goods were together at the freight station, and the agent knew when Sanborn took away a part of each of the three shipments, and made no objection.

"The goods had reached their ultimate destination and according to the previous and customary course of dealing were so far within the control of the consignee that he was at liberty to take away any that he chose, and he had taken away a part of each shipment. The selection of the goods removed was not determined or controlled by any restriction upon the consignee's right of removal. The goods remaining at the freight station were left there, not because of the consignee's neglect or refusal to accept or his inability to take them, *Innes v. Lane*, 57 N. H. 454, *Reynolds v. Railroad*, 48 N. H. 520, but because he did not choose to remove them at that time. They were left voluntarily and temporarily, as a matter of convenience to the consignee. By the previous course of dealing the rule of the railroad requiring payment of freight as a condition precedent to delivery had been waived, and Sanborn had been allowed to use the freight station for the temporary storage of goods consigned to him, taking them away as he wanted them. A portion of the goods had been at the station nearly a month, and the last shipment arrived eight days before the attachment. The railroad allowed the goods to remain there for Sanborn's accommodation, holding them as his agent and not as carrier. Its duties and its liabilities as carrier and insurer had terminated, and its responsibility was that of warehouseman only. *Moses v. Railroad*, 82 N. H. 528; *Smith v. Railroad*, 27 N. H. 86. The customary course of dealing is presumed to continue, and both the carrier and the consignee must have understood that the goods remained at the freight station as the goods of the consignee at his risk and subject to his order and control, notwithstanding the undisclosed purpose of the agent, at the time of the attachment, to hold the balance of the goods until the freight was paid. 'The carrier's change of character into that of an agent to keep the goods for the buyer, is not at all inconsistent with his right to retain the goods in his custody till his lien upon them for carriage or other charges is satisfied. Nothing prevents an agreement by the master of a vessel or other carrier to hold the goods after arrival at destination as agent of the buyer, though he may at the same time say, I shall not let you take them till my freight is paid.' *Benj. Sales* (4th Am. ed.), § 1270.

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"If the existence of a carrier's lien, without other evidence, authorizes an inference that he holds the goods as carrier and not as warehouseman, such an inference is controlled and rebutted in this case by the previous course of dealing between the carrier and the consignee. The capacity in which the railroad held the goods is a question of fact that might depend largely or wholly upon the understanding and intention of the railroad and Sanborn (Benj. Sales, §§ 1264, 1270), and could have been properly determined at the trial term in favor of the defendant. As to some or all of the goods, there may be a question whether there is any evidence of a right of stoppage *in transitu*, and whether a decision in favor of the plaintiffs could be sustained. The case having been submitted for such judgment as should be ordered at the law term, there being no conflict of evidence, and it being clear that the *transitus* was at an end when the attachment was made, there seems to be no occasion for another trial."

The latest adjudication on this point is *Bethell v. Clark*, 19 Q. B. Div. 533. T., in London, bought goods of C., in Wolverhampton, and directed C. to consign them to the *Darling Downs*, to Melbourne, loading in the East India Docks. The goods were forwarded by railway to Poplar for shipment, and were shipped on the *Darling Downs* for Melbourne at noon on July 8. About 10 o'clock on the same morning C., at Wolverhampton, having heard of T.'s insolvency, sent a written authority to the railway company to stop delivery of the goods, and the railway company at once telegraphed to their agent at Poplar to that effect, but the message did not arrive in time to prevent the shipment of the goods on board the *Darling Downs*. The mate's receipt for the goods was given to the railway company and by them forwarded to T., but no bills of lading in exchange for the receipts were ever applied for by any of the parties. The *Darling Downs* sailed for Melbourne with the goods on board. On July 11, T. presented a bankruptcy petition, and a scheme of arrangement was ultimately approved of by the creditors. The trustee under the scheme having claimed the goods, *held*, that there was no constructive delivery of the goods to the buyers; and that therefore the transit was not at an end and the notice to stop was good. The court by MATHEW, J., said:

"It was contended for the trustee of the buyer's estate that the rule of law applicable to the case was this: that where goods have arrived at a place indicated by the buyer to the seller, and are to remain there in the hands of an agent of the buyer, there is an end of the *transitus*, although the place be not that of their ultimate destination. In the particular case it was said that the master or mate of the vessel was the agent of the buyers, who as between them and the sellers was to receive the goods for the buyers, and therefore that this transit ended with the shipment.

"But the principle to be gathered from the many decisions on the subject seems to me to be, that in determining whether there has been a constructive delivery of the goods to an agent of the buyer it must be ascertained in what capacity the agent has received the goods, whether to carry or to hold for the buyer. In other words the inquiry must be, what is the exact nature of the contract between the buyer and the agent under which the latter has received the goods. In *Dixon v. Baldwin*, 5 East, 175, the evidence was directed to

show that Metcalf received the goods as agent for the buyers, in order that he might hold them until he received further orders as to their destination, and that without such orders the goods in his hands would remain stationary. The court held upon this evidence that when the goods reached Metcalf the transit was at an end.

"In *Kendal v. Marshall*, 11 Q. B. Div. 356, the facts as presented to the Court of Appeal would seem to be different from those dealt with by the court below. At the trial it appeared that Marshall & Co. had entered into a contract with the buyers to forward the goods at through rate from Bolton to Rouen. It was not suggested that there was any contract between the buyers and Marshall & Co. other than the contract to forward. There was no evidence that the railway company were the agents of the buyers. They were treated as having acted for Marshall & Co. In the Court of Appeal, it would appear from the judgment of all the lords justices, that it was assumed or admitted that the railway company were the agents of the buyers to carry the goods to Garston and there deliver them to Marshall & Co. to be held by them for the buyers until further orders were given. With this material alteration of the evidence submitted to the Court of Appeal the case was readily brought into line with *Dixon v. Baldwin*, 5 East, 175, and it was held that there had been a constructive delivery to the buyers. The judgments delivered in the Court of Appeal in this and in the later case of *Ex parte Miles*, 15 Q. B. Div. 39, seem to me to involve the application of the principle that in determining whether the goods are still *in transitu* a sufficient inquiry into the facts must be made to ascertain what had been the contract between the buyers and the agent who has received the goods.

"The cases referred to are instances of constructive delivery to the buyer and of consequent termination of the transit. But the numerous cases from *Smith v. Goss*, 1 Camp. 282, to *Ex parte Watson*, 5 Ch. D. 85, in which the receipt of the goods by the agent has been held not to be a constructive delivery to the buyer indicate, it seems to me, with equal clearness the existence and application of the rule. These authorities show, that although the fact that a person has been named by the buyer to the seller to receive the goods is some evidence, it is by no means conclusive evidence that the receipt by that person is the end of the transit.

"The case of *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560, presents a close analogy to this case. The buyer had purchased china clay which was to be delivered by the seller free on board at a specified port. Afterward the buyer named the vessel to the vendor and the clay was shipped. Before the ship sailed the buyers stopped payment, and notice to stop *in transitu* was given to the master. No bill of lading had been signed. It was decided by the Court of Appeal that the transit was not at an end.

"In the present case it seems clear that the London and North Western Railway Company, the lightermen, and the shipowners were all agents of the buyers, not to hold but to forward the goods. The reason urged by the learned counsel for the trustee, that the delivery on board the ship to the mate was a constructive delivery to the buyers, would apply as forcibly to the delivery to the London and North Western Railway Company. But if this were a delivery to

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the buyer the transit would have ended in law at the point where it commenced in fact. The contract with the shipowner was to forward the goods to Melbourne, and there deliver upon the terms of a bill of lading in the usual form, and until the bill of lading had been transferred to a *bona fide* holder for value it seems to me that the sellers in this case would retain the right to stop in transit.

"It was further urged for the trustee that the transit was over when the goods were shipped, because the goods might, on the demand of the buyers, have been taken out of the possession of the master of the ship; but this possibility, so remote in a business point of view, is no proof that the transit was terminated. See *London and North Western Ry. Co. v. Bartlett*, 7 H. & N. 400."

CAVE, J., said: "In all cases of stoppage in transit it is necessary first of all to ascertain what is the *transitus* or passage of the goods from the possession of the vendor to that of the purchaser. The moment the goods are delivered by the vendor to a carrier to be carried to the purchaser the *transitus* begins. When the goods have arrived at their destination and have been delivered to the purchaser or his agent, or when the carrier holds them as warehouseman for the purchaser, and no longer as carrier only, the *transitus* is at an end. The destination may be fixed by the contract of sale, or by directions given by the purchaser to the vendor. But however fixed, the goods have arrived at their destination, and the *transitus* is at an end, when they have got into the hands of some one who holds them for the purchaser and for some other purpose than that of merely carrying them to the destination fixed by the contract or by the directions given by the purchaser to the vendor. The difficulty in each case lies in applying these principles.

"The railway company sent the mate's receipts to the purchasers, who did nothing with them. No bill of lading was obtained by any one; and the goods went to Melbourne, because by the direction of the purchasers the vendors had put them on board a vessel bound for that place. Under these circumstances I am unable to distinguish this case from that of *Ex parte Rosevear China Clay Co.*, 11 Ch. D. 560, which is binding upon us, although I am also unable to reconcile that case with some of the *dicta* in *Ex parte Miles*, 15 Q. B. Div. 89. I agree therefore that judgment must be entered for the defendants."

In *Ex parte Miles*, *In re Isaacs*, 15 Q. B. Div. 89, a commission agent in London ordered goods of a manufacturer, to be shipped to his principals in Jamaica, and to be paid for by bills drawn by the sellers on the agent. Subsequently the agent directed the sellers to forward the goods to shipping agents at Southampton for shipment. The goods were so shipped, the bills of lading describing the agent as consignor and the principals as consignees. After the ship had sailed, but before her arrival at Jamaica, the agent stopped payment, and the sellers, who had not been paid, notified the ship-owners to stop the goods in transit. *Held*, that as between the agent and the sellers, the transit ended at Southampton, and the notice was too late. BRETT, M. R., said: "Now what is meant by sending goods to their destination? It seems to me that it means sending them to a particular place, to a particular person who is to receive them there, and not sending them to a particular place without saying to whom. That is the meaning of destination in a business sense." Citing *Dixon v. Balduen*, 5 East, 175; *Valpy v. Gibbon*, 4 C. B. 887.

MAYES V. STATE.

(64 Miss. 282.)

Criminal law—homicide—res gesta—declarations of deceased.

A., having been fatally assaulted, ran about a hundred yards, and on a third party's coming up about five minutes after the assault, told him the name of his assailant. *Held*, that this declaration was inadmissible as part of the *res gesta*.*

CONVICTION of murder. The opinion states the case.

W. V. Sullivan, for appellant.

T. M. Miller, attorney-general, for State.

COOPER, C. J., The appellant has been convicted of the murder of one Albert Lester, and assigns many errors in the proceedings in the court below. We deem it unnecessary to consider the many assignments, many of which are without the semblance of merit, since the judgment must be reversed on the point hereinafter indicated.

The homicide occurred at a social meeting, which had been protracted through the night, during which time many of those present had indulged in the excessive use of intoxicating liquor, a number of fights resulted, and among these was one between the deceased and one Kirkwood. According to the testimony of the witnesses for the State, it appears that while Kirkwood and deceased were fighting the appellant ran in between them, threw his arm around deceased, and cut him with a knife across the stomach, inflicting the wound from which death resulted. On the other hand, the testimony of other eye-witnesses who testified on behalf of the appellant is that he did not inflict any wound on deceased but only separated him and Kirkwood and that Kirkwood gave the mortal blow. The dying declaration of the deceased, made several days after the injury, was admitted in evidence, and by it it appears that the appellant was the guilty agent. But testimony tending to impeach the credibility of this dying declaration was introduced by

* See note, 38 Am. Rep. 641; *contra*: *State v. Molasse* (38 La. Ann. 381), 58 Am. Rep. 181.

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the appellant. The court below, over the objections of the defendant, permitted a witness (Henry Wortham) to testify to a statement made by deceased under these circumstances. When deceased was cut he immediately turned and ran a distance of from one hundred to one hundred and ten yards (pursued a part of the way by the appellant, who repeatedly snapped a pistol at him but who turned back before deceased ceased running) and then turned into the woods and lay down. The witness, Wortham, walked up in the direction in which deceased had gone, and when he had gone a part of the distance he heard one Lynch call out to him, saying: "Here is Albert out in the woods with his guts cut out;" the witness then went to where deceased was lying, and before getting there he heard him and Lynch engaged in conversation. Witness reached deceased as nearly as he could fix the time in about five minutes after the wound had been given, and when he came up deceased said to him: "Henry, Sid (the appellant) has cut my guts out; did you see him?"

Upon objection of this testimony being made, the learned judge ruled that the statement of the injured party was so recently made after the wound had been given that it was a part of the *res gestæ*, saying that he did not think sufficient time had elapsed to warrant the suspicion of fabrication.

An examination of the approved text-writers, and of the decisions to which they refer, discloses, especially in the decisions of American courts, a somewhat loose regard for well recognized rules governing the admissibility of evidence. That hearsay testimony cannot be given is universally admitted by the courts which have from time to time been called upon to determine whether statements of this character are competent, and they have, without exception, declared that when the statement assumes the character of a narrative of a past transaction it is incompetent. But in many cases what were manifestly completed and finished acts have been by a sort of construction treated as incomplete and unfinished, and the statement thus held to be a verbal act incorporated with and a part of the thing being done.

In *Thompson v. Trevanion*, Skinner, 402, Lord Chief Justice HOLT "allowed what the wife said immediately upon the hurt received, and before she had the time to contrive or devise any thing for her own advantage," to be given in evidence. In *The King v. Foster* the witness had seen a cab drive by at a very rapid rate, but

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did not see the accident, but "immediately after heard the deceased groan, and went to where he was lying." It was then proposed to show what the deceased then said as to the cause of his injury, and objection was made by the defendant, but the objection was overruled, the judges ruling that what he said at the instant, though after the injury, was competent. These two cases, as was pointed out by Mr. Justice CLIFFORD in his dissenting opinion in *Insurance Company v. Mosely*, 8 Wall. 419, have been criticised by Mr. Roscoe as "difficult to reconcile with established principles." In *Insurance Company v. Mosely*, *supra*, statements of the deceased made several minutes after the injury, which it was alleged had resulted in death, as to how he was injured, were admitted by a divided court.

In *Commonwealth v. Pike*, 3 Cush. 181, the statement of the injured party made some time after the injury — exactly how long is not shown — was received. So also in *People v. Vernon*, 35 Cal. 49, and *Mitchum v. State*, 11 Ga. 616.

On the other hand, in *Bedington's* case, 14 Cox Cr. Cas. 341, the injured party was seen coming out of a room with her throat out, and speaking to the first person she met, said, "See what Bedington has done." It was proposed to give this statement in evidence against the defendant, but COCKBURN, C. J., rejected it, holding that it was not a part of any thing then being done, but was a mere statement of a past transaction. *Commonwealth v. Pike*, 3 Cush., has been practically overruled by the subsequent cases of *Lund v. Tyngsborough*, 9 Cush. 36; *Chapin v. Marlborough*, 9 Gray, 244; s. c., 69 Am. Dec. 281, and *Commonwealth v. Denmore*, 12 Allen, 535. So also *People v. Vernon*, 35 Cal., has been overruled in the later case of *People v. Ah Lee*, 60 Cal. 85.

The question of the admissibility of such statements was elaborately and ably discussed by FLETCHER, J., in the case of *Lynd v. Tyngsborough*, and by CLIFFORD, J., in his dissenting opinion in *Insurance Co. v. Mosely*, 8 Wall. We concur in the views there so clearly enunciated against the competency of such proof, which are in harmony with decisions in our State. *Kendrick v. State*, 55 Miss. 436; *Kramer v. State*, 61 Miss. 151. It is not enough that the statement will throw light upon the transaction under investigation, nor that it was made so soon after the occurrence as to exclude the presumption that it has been fabricated nor that it was made under such circumstances as to compel the conviction of its truth; the true inquiry, according to all the authorities, is whether the

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declaration is a verbal act, illustrating, explaining or interpreting other parts of the transaction of which it is itself a part, or is merely a history or a part of a history of a completed past affair. In the one case it is competent, in the other it is not. We are not to be understood as attempting to lay down any rule for the decision of what under all circumstances is the limit of the existence of the principal fact which may be explained by contemporaneous declarations. In some cases the *res gestæ* may extend over weeks or months, in others they are limited to hours, or to minutes, or to seconds of time. Each case must be determined by its own particular circumstances. Mr. Wharton very well expresses the law on this subject by contrasting the sudden affray between strangers with the social feud which gave rise to the Gordon riots in England. He says, "nor are there any limits of time within which the *res gestæ* can be arbitrarily confined. They vary in fact with each particular case. If in any one of our streets there is an unexpected collision between two men, entire strangers to each other, then the *res gestæ* of the collision are confined to within the few moments that it occupied. But when there is a social feud, in which two religious factions, as in the case of the Lord George Gordon disturbances, or of the Philadelphia riots of 1845, are arrayed against each other for weeks, and are so absorbed in the collision as to be conscious of little else, then all that such parties do or say is as much part of the *res gestæ* as the blow given in the homicides for which particular prosecutions may be brought." Whart. Cr. Ev., § 262.

We think, on the facts of this particular case, the statements of the injured party were not of the *res gestæ*; that they found no support or credence by reason of any thing being done, but owed their whole force to the credit of the declarant and therefore should have been excluded by the court. For the error in permitting the statement to be given in evidence the judgment must be reversed and a new trial awarded.

QUINTINI V. BOARD OF ALDERMEN.

(64 Miss. 462.)

Nuisance — dwelling-house — obstruction to air and prospect.

A private dwelling-house may not be declared a nuisance by authority of the legislature, simply because it may injure adjoining property by cutting off the breeze from, and the view of the sea.

ACTION for injunction. The opinion states the case. The injunction was denied below.

W. P. & J. B. Haines, for appellant.

Possey & Bowers, for appellee.

COOPER, C. J. The appellant exhibited her bill in the Chancery Court of Hancock county to enjoin the board of mayor and aldermen of the town of Bay St. Louis from interference with her in the erection of a residence and market-house on a certain lot in that town of which she is the owner.

She avers the fact to be that on the lot there has existed a market-house for more than forty years, that she bought it for the purpose of keeping a market-house thereon, but finding the building old and decayed she took it down, and at considerable expense has prepared it for another larger and better building, and was about to erect the same when the marshal of the town, acting under an ordinance of the town, forbade her from proceeding with the building, and threatened to arrest her and her workmen, whereby they were intimidated, and she has been unable to procure them to proceed with her improvements.

The municipal authorities, answering the bill, admit the fact charged by the complainant, and insist upon the validity of the ordinance by which buildings on lots situated as complainant's lot is are prohibited.

Reliance is placed by the defendants upon the peculiar location and character of the town as related to the lots referred to in the ordinance, and give this description of what is termed by its charter the "city of Bay St. Louis."

"Respondents further declare and show the fact to be that the city of Bay St. Louis is built for about eight miles along the west-

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ern bank or shore of the Bay of St. Louis, and nearly all the residences are built along the water front of said bay, and facing east, commanding a beautiful view of said bay and of Mississippi sound; that along said shore and between it and the said line of residences there is, and for many years has been, a hard shell road, an easy and beautiful drive and highway for carriages and vehicles, which is and for many years past has been kept in good condition at a large annual expense to said corporation; that said city of Bay St. Louis is and for many years has been a famous and favorite summer resort, as a sanitarium, for health, recreation, and pleasure, and its real estate derives almost its whole value from this fact and from its commanding view of the waters of Mississippi sound, and the fact that cool breezes habitually and daily blow from the Gulf of Mexico over this sound, and thus reach said residences and said shell road and drive, which in summer is daily covered with carriages and vehicles and persons on foot, who walk or drive along said shell road for their health and comfort, and relief from the summer heat; that the erection of buildings (except open summer-houses) between the said shell road and said shore obstructs and cuts off the view upon Mississippi sound, it obstructs the cooling and healthful breezes from the gulf, and creates heat and discomfort to the persons resident or sojourning in said city, and impairs their comfort and health; that the erection of residences and market-houses between said shell road and shore, necessarily and ordinarily by the uses thereof, create and engender uncleanness, filth, and noxious, unwholesome, and disagreeable odors and smells, and impairs the health, convenience, and comfort of the public, the people residing or sojourning in said city." It is further said in the answer that the building contemplated to be erected by the complainant, "as a residence will contain a privy and a stable for horses immediately upon and under said shell road and highway of said city, and between said shell road and the shore of the bay, and that the prevailing winds blowing from the Gulf of Mexico to the said shell road and the residences on the west side thereof will be obstructed by said building, and said winds will come burdened with the noxious and disagreeable smells and odors of privies and horse stables, and the bones and horns of slaughtered cattle, etc.; that the said corporation by its refusal to permit the erection of said building has exercised the discretion vested in it by its charter, and has adjudged such erection to be a nuisance."

The answer further avers that the complainant bought the property from its former owner with the intention of erecting thereon a building forbidden by the ordinance, and that the former owner sold the same to her for an insignificant price; that he had "tried to sell said lot of land to several persons, but they would not buy it because they could not use it to any profit without violating an ordinance of the town, and that complainant bought it with knowledge that she could not use it without violating said ordinance."

The ordinance referred to is as follows: "It is ordained by the board of mayor and aldermen of the city of Bay St. Louis that no person or persons shall build any house, or put up any shanties, huts, or erect any tents of any kind on the edge of the bank in front of said city between the road or street and the sea without a special permit from the board of mayor and aldermen, except such as are known and designated as summer-houses, for shade only, and any houses built without such permission shall be considered as a nuisance."

By the charter of the town (Acts of 1882, p. 363), express authority was given the city authorities to enact the ordinance. By the act of March 16, 1886 (Acts of 1886, pp. 425 to 459), the charter of the town was amended, and by section 42 the power was given to the board of mayor and aldermen "to declare what shall constitute a nuisance in said city, and to prohibit, prevent and abate the same, and in connection with all matters or things that are or may be hereafter declared as aforesaid to be a nuisance shall be included all shanties and other buildings now erected or hereafter attempted to be erected on the beach side of the front street of said city when the same has a tendency to depreciate in value the property of persons near by or in any manner obstruct the view of the same, or the breeze therefrom, the same being essential to the comfort, convenience and good health of the occupants thereof; and any act done, or structure or thing erected or suffered, after it has been declared by said board of mayor and aldermen to be a nuisance, is hereby declared to be a nuisance, and shall be so held and considered by all the courts of this State as fully as if such act, thing or structure, were herein expressly named and prohibited."

Complainant's lot is within the forbidden ground and the question presented is whether it is competent for the legislature to de-

clare or to authorize the municipal authorities to declare private residences to be nuisances because the same "has a tendency to depreciate in value the property of persons near by, or in any manner to obstruct the view of the same or the breeze therefrom."

With every inclination on our part to speak with due respect of any act which has received the approval of the legislative department of the government, we can scarcely deal seriously with this legislative declaration of what is a nuisance. The absurdity of the proposition that one man's house becomes a nuisance because it obstructs the views of his neighbor across the street or intercepts a breeze which may blow from his point of the compass is rendered doubly apparent when the act is applied to the city under consideration. According to the description given by its municipal officers, the city of Bay St. Louis consists chiefly of residences built along a street or shell road, eight miles long, and upon the western side of the street. Along the eastern side of this street are situated numerous houses used by the owners and occupants as places of business, and so far as shown by the record all the land between this road and the bay is the subject of private ownership. By one legislative decree this private property along the whole of one side of the principal street is swept out of beneficial existence because the use of it for any of the ordinary purposes of life has a tendency to depreciate that upon the other side by obstructing the view of the bay, or by intercepting the breezes which blow from the Mexican gulf. There is scarcely, either in the answer or the evidence, a suggestion that the object of the ordinance and legislative declaration is other than to enhance the beauty of the street. The suggestion that the health of the town will be impaired by the obstructing of the health-giving breezes raises the pertinent inquiry why they will not be equally obstructed by the residences on the other side of the street, and the fact that the view will be obstructed suggests the further question whether a view can be taken from one man because it can be enjoyed only from the rear of his house and conferred upon another whose only superior equity is that it is unfolded in his front. The law can know no distinction between citizens because of the superior cultivation of the one over the other. It is with common humanity that legislatures and courts must deal, and that use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class. That

the legislature in the exercise of the police power may prohibit in particular localities such use of property as is injurious to public health is admitted, and what it may do may also be authorized to be done by the local authorities, but it does not follow that it may by a mere declaration convert the harmless, proper and ordinary use of property into a nuisance. Where the use of the land furnishes the test for the determination of the constitutionality of the law, the legislature may not conclusively determine the effect to be harmful. This would be the assumption of judicial functions by the legislative department and if yielded to by the courts would be an abrogation of those duties and powers committed by the Constitution to the judicial department and the untrammelled exercises of which is essential for the preservation of life, liberty and property. *Hutton v. Camden*, 39 N. J. 122; s. c., 23 Am. Rep. 203; *Tiedeman Police Powers*, 427.

The effect of the ordinance is to deprive the owners of property of its lawful use for a supposed public advantage, and before this can be done there must be just compensation first made.

The fact that in declaring buildings of the character in question nuisances the municipal authorities have also provided that persons who erect them may also be prosecuted in the courts of the town does not preclude relief by injunction. The ordinance, as we have said, is an attempted dedication of private property to public uses without due compensation first made, and this a Court of Chancery has jurisdiction to prevent. It is immaterial that the exercise of this power will, as a consequence, protect the owner from criminal prosecution.

Whether the owner of the property may keep a market thereon is not presented by this record. There is no ordinance of the town, so far as now appears, by which such use is forbidden. The prohibition is against the erection of any building on the lot, regardless of the use to which it may be put.

The decree is reversed, the injunction reinstated, and the cause remanded.

Ware v. Allen.

. WARE V. ALLEN.

(84 Miss. 545.)

Statute of frauds—promise to pay debts of another.

An oral promise to a debtor to pay his debt to a third is not within the statute of frauds.

ACTION on an oral promise. The opinion states the point. The defendant had judgment below.

Harris & Dodds and Calhoun & Green, for appellant.

Thompson & Sexton, for appellee.

ARNOLD, J. The demurrer should have been sustained. The plea to which it was applied constituted no defense to the action. A promise made to a debtor to pay a debt which he owes to a third person is not a promise to answer for the debt of another within the meaning of the statute of frauds. The statute applies only to promises made to the person to whom another is answerable. Brown Stat. Frauds, § 166; *Eastwood v. Kenyon*, 11 Ad. & E. 438; 3 Pars. Cont. 24, 26; *Crim v. Fitch*, 53 Ind. 214; *Lee v. Newman*, 55 Miss. 365.

The promise of appellees as alleged in the declaration was not made to the creditor of appellant, but to appellant, and it was agreed that in consideration that appellant would part with his interest in the stock of goods, appellees would pay a debt which he owed to a third person. Such promise was no more within the statute of frauds than it would have been if appellees had promised to pay directly to appellant so much money for his interest in the stock of goods. The transaction was about as free from all the requirements of the statute of frauds as one well could be.

Judgment reversed and cause remanded.

MURPHY V. RED.

(84 Miss. 614.)

*Insurance — life — assignment — interest.***S**UFFICIENTLY reported, 58 Am. Rep. 555.

FRANTZ V. DOBSON.

(84 Miss. 681.)

Execution — exemption — "tools" — printing-press.

A printing-press is not a "tool" exempt from execution.*

BILL for injunction against sale on execution. The head-note states the point. The defendant had judgment below.*Wm. Buchanan and Nugent & McWillie, for appellant.**Cole & White and J. M. Miller, attorney-general, for appellee.*

ARNOLD, J. Section 468 of the Code exempts from taxation "the tools of any mechanic necessary for carrying on his trade." Whether a printing-press, owned by a practical printer, editor, and publisher of a newspaper, and necessary to carry on his trade or business as printer and publisher of such paper, is embraced in this exemption, is the question to be determined in this case.

Authorities relating exclusively to homestead and other exemptions from the payment of debts are relied on by appellant to support the issue on his part. But statutes exempting property from levy and sale for the payment of debts and those exempting persons or property from the payment of taxes are construed quite differently. The former class of statutes, based on the benevolent public policy of preventing destitution and pauperism, and on the patriotic motive of inspiring sentiments of independence favorable, if not essential, to the maintenance of free institutions, are uniformly construed with the utmost liberality, to advance these objects, whilst statutes of the latter class, on account of their making invidious

* *Contra: Bliss v. Vedder* (84 Kans. 57), 55 Am. Rep. 237.

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distinctions between citizens and partaking of the nature of favoritism and producing injustice and inequality in the contributions to a common burden, are construed strictly, to avoid these evils.

The general policy of the law is that all who enjoy the protection of government shall contribute to defray its expenses. Taxation is an act of sovereignty which should be performed with justice and equality to all. Taxation is the rule, exemption the exception. Exemption from taxation is a matter of grace and favor, not to be presumed or implied. Unless it is clearly intended and expressed, it is not allowed. *Cooley Taxation*, 146-152.

We are of opinion that a printing-press is not a tool within the meaning of the statute. It accords with the letter and spirit of the statute to say that the legislature intended thereby to exempt only the simple instruments used by the mechanic in manual labor, such as hammers, saw, plane, file, and the like, and that machinery or apparatus as complicated and valuable as a printing-press may be was not contemplated by the statute. Under statutes similar to our own, exempting the tools of mechanics from liability to execution or attachment for debt, where, as before stated, the greatest liberality of interpretation is indulged, it has been several times decided, that a printing-press was not exempt. *Thomp. Exemptions*, §§ 756-758; *Buckingham v. Billings*, 13 Mass. 82; *Danforth v. Woodward*, 10 Pick. 423; s. c., 20 Am. Dec. 531; *Spooner v. Fletcher*, 3 Vt. 133; s. c., 21 Am. Dec. 579; and in *Whitcomb v. Reid*, 31 Miss. 567, it was held that the instruments of a dentist, used in the practice of his art, were not exempt from execution or attachment, under a statute in the very words of the one now under consideration.

To save to the poor and toiling mechanic the means of employment in his trade, is suggested by sound policy as well as by sentiments of humanity, but a purpose to extend the circle of exemption from taxation, beyond this, so as to embrace property that may be worth thousands of dollars, cannot be ascribed to the legislature by any proper construction of the statute in question.

Judgment affirmed.

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(64 Miss. 644.)

Jury — separation.

On a murder trial, after the case was submitted to the jury, members of the jury were permitted to go to a privy seventy-five yards distant, unattended by an officer. It was not shown that any one did or could communicate with them. *Held*, no error. (*See note, p. 73.*)

CONVICTION of manslaughter. The opinion states the point.

Wells & Williamson, for appellant.

T. M. Miller, attorney-general, for State.

COOPER, C. J. [Omitting minor questions.] There are to be found many expressions in our reported cases to the effect that where circumstances were shown which exposed the jury to the possibility of being tampered with, the verdict must be set aside unless it is affirmatively made to appear that no improper influences were brought to bear upon it. But this language must be interpreted by the circumstances of the case in which it was used. In *Hare's case*, 4 How. 187, the jury, after retiring to consider of its verdict, was left by the bailiff in charge of an unsworn officer; so also in *McCann's case*, 9 S. & M. 465. In *Nelms v. State*, 13 S. & M. 500, the sworn officers in charge of the jury talked with them upon the question of the guilt of the defendant, one of them saying it was a worse case than Dyson's, and the other that "public opinion was against the accused." In *Bols case*, 13 S. & M., the jury was taken by the officer to a public hotel and there took meals with other guests, but an officer was seated between them and such other persons; a barber was admitted to the jury-room to shave one of the jurors, and the officer left the room, leaving him with the jury. Under these facts a new trial was awarded. In *Riggs' case*, 26 Miss. 51, the jury was taken to a public hotel and took meals with a "crowd of guests." The landlord and his servants had free access to a room in the hotel in which the jury was kept. An adjoining room was prepared for the jury in which intoxicating liquor was put, and to which the "jurors went separately to drink." The

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jury had "cards, liquor, and a fiddle," all of which they used during the night. The next morning one of the jurors, without the consent of the officer in charge, separated from his fellows and paid a visit to his family. In *Organ's case*, 26 Miss. 78, one of the jurors "left his fellows as they were retiring to consider of their verdict, and without the permission of the court went out of the courthouse, passing, as he went, several persons who were in conversation, and remained out of the house for several minutes." This was held to vitiate the verdict. In *Woods v. State*, 43 Miss. 364, the jury, by the consent of the accused, was permitted to disperse and its members mingled with the public. It was held that the consent of the prisoner did not preclude him from making the objection and that the separation vitiated the verdict. In *Durr v. State*, 53 Miss. 425, one of the jurors was conducted by the bailiff to the house of a friend, a quarter of a mile distant from the courthouse, and there took dinner by himself in a room out of the presence of the bailiff. He was in a room in the rear of the building, remote from the observation of the bailiff. The room had four entrances, and there were one or more persons upon the premises with whom it was not shown that he had no communication. In all these cases the verdicts were set aside and new trials awarded. It will be noted that in all of them it was either shown that other persons had been brought in contact with the jury, or that there was a separation of the jury under such circumstances as to afford a reasonable presumption that communication was had with others; there was in each case something more than a remote possibility that such communication was had, though in many of the cases observations are made by the court indicating that any separation of one juror from his fellows would be sufficient to annul the verdict, unless it was affirmatively shown that no communication was had with others.

We find no fault with the result reached in either of the cases cited, but we do not concur in the language used in some of them, from which the conclusion is sought to be drawn, and reasonably, that the mere withdrawal of a juror from the sight of his fellows and of the officer is under any and all circumstances a separation of the jury. Whether it is or is not must, as it seems to us, be dependent upon the circumstances of each particular case. Judges and jurors are but men, and we know of no reason why, in dealing with the action of jurors, an impracticable and unapproachable

standard shall be adopted by courts to measure their conduct—a standard which if applied to the judges of the courts, would produce frequent miscarriages of justice. If the mere possibility of unlawful communication or influence is sufficient to annul a verdict, when shall one be said to be pure and free from suspicion? All our court-houses are in public places, and the public have right of access to them. At sessions of court many persons are there congregated, either from curiosity or by reason of business for themselves or others; jury-rooms open into the court-rooms, frequently filled with spectators, or by windows overlook the yards; communication by writing, by signs, and by words is always possible, but it would be destructive to the ends of justice to hold that such possibility as this of unlawful influence should avoid verdicts upon which no just suspicion rests. To this all must agree.

But the question is, where lies the line on the one side of which a presumption exists in favor of the purity of the verdict, and on the other a contrary presumption arises? The answer must be that whatever is sufficient to create a well-founded suspicion in the impartial judicial mind that unlawful influences have been exerted will call upon the party in whose favor the decision rests to support the verdict, but until that much is shown in opposition to the verdict it should be upheld. If a juror willfully and without necessity withdraws from his fellows and goes to a place in which communication may be secretly had with another, his willful conduct, unexplained, may be sufficient to impair the faith which would otherwise be reposed in the integrity of his verdict. But can it be said that where, as in this case, several members of the jury separate themselves for a few moments from their fellows and the officer in charge by stepping into a privy to attend to the calls of nature, such conduct is calculated to impress any unbiased mind unfavorably to them? It is not attempted to be shown that any one other than the jurors and a deputy sheriff (who went into the privy while they were there, but who, it is affirmatively shown by his testimony, held no improper correspondence with them) was in the privy. It is only said that possibly some other person was there, and because of this possibility the verdict must be overturned unless it is clearly made to appear that no one else was or could have been there. In other words, the defendant shows the court the opportunity there was for communication if there was a third party there to communicate with the jurors, and the exist-

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ence of this third person, it is insisted, is to be supplied by presumption.

We do not think the character of the place, a public privy at a court-house, is at all favorable to the presumption that any one would be there longer than his necessities compelled him to be. It is not as though a juror had gone to a place to which the public resort and remain for social intercourse.

The deputy sheriff who went in while the jurors were there saw no one; the bailiff in charge of the jury, who stood a short distance off, saw no one; the witnesses who saw the jurors go into the privy and testified for the defendant saw no one; and yet it is argued that a presumption (which is a reasonable inference from known facts) must be indulged that some one bent on injury to the defendant was there at that particular time for the unlawful purpose of influencing the jury to convict him. We are free from doubt on this question. If in the infinite possibilities of error, which may occur in all finite tribunals, no more probable injury shall be shown in the administration of our criminal laws, all innocent men may rest in the abiding confidence of immunity from punishment for crime they have not committed.

Judgment affirmed.

NOTE BY THE REPORTER.—See *Goersen v. Com.*, 106 Penn. St. 477; a. c., 51 Am. Rep. 534.

In *State v. Murray*, 91 Mo. 95, during the progress of a capital trial, and after the jury had been put in charge of the sheriff, some of them were suffered to remain in the dining room of the hotel while the others went up to the bar of the saloon, out of sight of those in the dining room, the sheriff standing inside of the saloon and two or three feet from the door. *Held*, that a conviction will be reversed. The court said:

"Mr. Bishop states that the rule in this country, prohibiting the separation of the jury in capital cases, is nearly universal. 1 Crim. Law, § 995. The earliest case in this State in relation to the enforcement of this rule arose in a capital case, that of *McLean v. State*, 8 Mo. 158, where the judgment was reversed upon the sole ground that the jury, after being sworn, were permitted to separate. This was the unanimous opinion of the court. At the same term of the court the case of *Whitney v. State* was decided (8 Mo. 165). It was not a capital case and the judgment was affirmed. There however the jury had brought into court an informal verdict whereby the defendant was found guilty, but inasmuch as the verdict was informal, the jury were sent back to put their verdict in shape. During this interval one of the jurors absented himself from the others for the space of half an hour, but on his return to his fellows the verdict of guilty was put in its proper shape and returned into court, and the absence of the juror was held no ground for reversal, and very properly was it so held. This also was a unanimous opinion, and no intima-

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tion is given that the rule established in *McLean's* case is disturbed. Yet strange to say, the latter case is ignored and *Whitney's* case constantly cited as upholding the rule of the immateriality of the mere separation of the jury even in a criminal case of the highest grade.

The law being thus established, the legislature, at the revising session in 1879, enacted several new sections in relation to juries in criminal prosecutions. Section 1909 provides: 'With the consent of the prosecuting attorney and the defendant the court may permit the jury to separate at any adjournment or recess of the court during the trial, in all cases of felony except in capital cases, and in misdemeanors the court may permit such separation of its own motion.' It will thus readily be seen that the legislature saw fit to establish a rule dividing criminal prosecutions into three classes: (1) to permit the trial court to exercise its own discretion of allowing the jury to separate in cases of misdemeanor; (2) to permit such separation with the consent of the prosecuting attorney and of the defendant, in all cases of felony except in capital cases; (3) to cut off all power in the trial court either with or without the consent of the prosecuting attorney and the defendant, of permitting the jury to separate in the class of cases last mentioned. This view is emphasized by the provisions of section 1216, a new section, which requires that in cases of a felony, when the jury retire to deliberate upon a verdict they shall do so in charge of an officer 'who shall be sworn to keep them together.' This view finds further emphasis in the provisions of section 1966, another new section, making it a good ground for a new trial, that the jury has 'been separated without leave of the court,' etc. And this too in cases where the court could have permitted their separation in the first instance by consent of parties, and though no proof be offered of prejudice by reason of such separation. In view of this recent legislation, so zealously guarding against the separation of juries in 'capital cases,' there would seem to be but one conclusion to be drawn from this act of the legislature, and that was to overthrow the rule then prevailing regarding the mere separation of the jury in capital cases as immaterial. If this is not the correct view to take of the matter then it must be confessed that such stringent legislation has failed of its purpose in establishing a rule of procedure in criminal cases, for if the legislative behest can be violated with impunity, unless something in addition to such violation be shown, it cannot be said to possess any of those sanctions which ordinarily pertain to legislative enactments. Within reasonable bounds I regard this legislation as mandatory. The whole history of the rule of law, as established in *McLean's* case, and as subsequently departed from in other cases, with which rule and the departure therefrom the legislature must be presumed familiar, and the recent legislation on the subject, go to uphold and confirm me in this view.

If the trial court could not, in the first instance, even with the consent of parties in a capital case, permit the jury to separate, it is difficult to see how its subsequent sanction of such separation could accomplish more. Of course, in holding that the law on the point under discussion is mandatory, it is not intended to give it any unreasonable construction. And it is not to be presumed that the legislature intended any such unreasonable result to flow from their

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action. *State v. Hayes*, 81 Mo. *loc. cit.* 585, and cases cited. If any imperative necessity demands that a juror withdraw from his fellows, in order to answer a call of nature, and this withdrawal is done under official supervision, while the remaining jurors are securely locked in their room, this would be, in spirit and reason, if not in letter, a compliance with the law, and this was the ruling in *Collins'* case, 86 Mo. 245. In the case at bar, however, the law was not complied with, either in spirit or in letter. Without the existence of any compelling necessity, the sheriff failed to observe his oath; and his duty to keep the jury together, he allowed them to separate; and this conduct of his brings this case within the principle announced in *Collins'* case, when first here, when we reversed the judgment because of such separation. 81 Mo. 652. *
MORTON, C. J., and RAY, J., dissent.

In *State v. Washburn*, 91 Mo. 571, after the jurors had retired to consider their verdict on a trial for felonious assault, the officer in charge, under the direction of the court, took two of them to a water closet in the rear of the saloon, directly across the street from the court house, and on their return they passed into the saloon, when the officer procured a glass of beer for one and a cigar for the other, the whole transaction occupying a brief space of time, and it appearing that the jurors spoke to no one except the deputy sheriff, and nothing was said to him in reference to the case, *held*, there was no ground for interfering with the verdict.

The court said: "It has been twice held, in capital cases, that the mere separation of a juror from his fellows during the progress of the trial, to answer a call of nature, the juror being under the charge of an officer, constituted no ground for a reversal of the judgment. *State v. Collins*, 86 Mo. 245. *State v. Payton*, 90 Mo. 220. In the last case, and in one instance considered in the first, the separations were without the consent or directions of the court but allowed by the officer in charge of the jurors. There is nothing inconsistent between those cases and the more recent one of the *State v. Murray*, 91 Mo. 95, for in the last case the doctrine is clearly asserted, that even in capital cases, section 1909 must have accorded to it a reasonable interpretation, and that the withdrawal of a juror from urgent necessity, under the supervision of an officer, would in spirit and reason be a compliance with the law. The fact that the jurors had retired to consider of their verdict, does not change the rule of the *Collins* and *Payton* cases."

MERCHANTS' WHARFBOAT ASSOCIATION v. WOOD.

(64 Miss. 661.)

Warehouseman — Sunday — agency — negligence — remote cause.

It being lawful in Mississippi for railroads and steamboats to do business on Sunday, a wharfboat proprietor is liable for negligence in not shipping goods on Sunday, if it is his custom so to ship goods.

W. shipped cotton to New Orleans by railroad, taking a through bill of lading. The railroad company, a warehouseman, and a steamboat company, had a general contract by which the railroad agreed to receive cotton from shippers and deliver to the warehouseman, who agreed to hold it till the arrival of the steamboat and then ship it thereon for New Orleans. W. knew nothing of this contract. *Held*, that the railroad company could not bind W. by a contract with the warehouseman in reference to W.'s cotton, which would relieve the warehouseman from the consequences of his own negligence or impose on W. the consequences of the contributory negligence of the railroad company.

The cotton being burned while in the hands of the warehouseman, who had failed to ship it by the first boat for New Orleans, but had awaited the departure of the boat with whose owner he had the general contract above alluded to, *held*, that if he, as a man of ordinary prudence, had notice from the surrounding circumstances of the danger from fire to which the cotton was exposed, it was his duty to ship it by the first opportunity.

But if the fire did not occur from any of the causes which should have reasonably excited apprehension, but from another and distant source, not a cause of reasonable apprehension of danger from fire, then the warehouseman is not liable for the loss.

ACTION for loss of goods delivered for carriage. The opinion states the facts. The plaintiff had judgment below.

Phelps & Skinner and Campbell & Starling, for appellant.

Le Roy Percy, for appellee.

COOPER, C. J. The appellees delivered to the Georgia Pacific Railroad Company certain cotton consigned to their commission merchants in the city of New Orleans. This cotton was carried under a through contract of affreightment, but the railroad was to deliver it to the appellant at Greenville at its cotton yard, and appellant was to deliver it to the steamer, by which the journey was to be completed. There was a contract between the railroad company, the appellant, and the steamers *Helena* and *Choteau* under which

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cotton from the interior was to be taken on through bills to New Orleans at a certain rate, of which the railroad received a certain sum, the appellant another, and the steamers the remainder. Where freights were not prepaid the railroad company on delivery to the appellant was paid by that company its freight, and when delivered by the appellant to the steamers they in turn repaid it the amount paid to the railroad company and also paid the sum due to appellant for its services, collecting from the consignee the total charges. Appellant is a warehouseman and forwarder, but not a common carrier. The steamers Helena and Choteau were due at Greenville on Saturday of each week, but they were frequently, if not usually, behind time, and it seems there was an agreement between the parties to the contract (the railroad company, the appellant, and the steamers) that cotton might be forwarded by other boats whenever the Helena or Choteau should be more than twenty-four hours late. Whether this modification of the contract was in force at the time of the loss of appellees' cotton is controverted, but for the purposes of this decision we will assume that it was.

Appellees' cotton was delivered by the railroad company to the appellant on Tuesday, the 22d day of December, 1885, and was destroyed in its yard by fire on Tuesday, the 29th, and to recover the value of the same this suit was brought. It is conceded that the fire was non-negligent in its origin. It originated in an oil mill which for three weeks before that time had not been running, and from thence was communicated to the cotton yard by burning shingles from the mill carried by an unusually high wind, which chanced to be blowing from the direction of the mill toward and across the yard. The ground upon which liability is sought to be fixed upon appellant is that it was guilty of negligence in not shipping the cotton to New Orleans on Sunday, the 27th, by the steamer Richardson, which then passed down the river and would have taken it if it had been tendered for transportation.

The appellant interposed several defenses to the suit: first, that it had no opportunity of shipping out the cotton except that afforded by the Richardson, and this being on Sunday it was not bound to ship by that boat, second, that under its contract with the railroad company and the steamers Helena and Choteau it was justified in holding the cotton until the arrival of one of those boats; third, that the railroad company was the agent of the plaintiff, and as such agent delivered the cotton upon an implied direction to hold

for shipment by the Choteau or the Helena; fourth, that the railroad company knew the dangerous condition of the yard and as agent of the shipper was guilty of contributory negligence in depositing the cotton in the yard; fifth, that there was no negligence in the detention of the cotton; and sixth, that the loss was not occasioned by the detention but by an independent proximate cause, viz., the burning of the oil mill.

On the trial it was shown that the yard of appellant was at the time of the reception of the cotton crowded with other cotton, much of which was not held for immediate shipment but was owned by purchasers who were in the habit of accumulating large lots before shipping out to eastern mills. Much of this cotton had been sampled by cutting large slits in the sides of the bales, and the samples when drawn were placed upon the bales, rendering them peculiarly easy of ignition. The yard was a place of public sale where cotton was carried and left until sold, where transactions of sale were made, and many persons assembling there for that purpose were in the habit of smoking, though forbidden so to do by the rules of the company and by posted notices. The engines of the railroad were driven in and through the yard in delivering the cotton transported by it. There were several small houses occupied by negroes adjacent to the yard, and one house used by the company in which cotton seed was stored. It also appears that the defendant was accustomed to ship out cotton on Sunday, that being the day on which the boats patronized by it most frequently arrived or departed.

In view of the latter fact we think the defendant could not avoid any liability which otherwise would attach to it on the ground that it was not under a duty to violate the Sabbath. It is certain that it was not for this reason it refused to deliver the cotton to the Richardson, and that it would have shipped it by the Helena or the Choteau if either of them had arrived on that day.

By the laws of this State (Code of 1880, § 2949,) the transaction of secular business on the Sabbath is prohibited and made penal, but the proviso to that section is "that nothing in this section shall apply to railroads or steamboat navigation in this State." The business in which appellant was engaged in reference to the property of the appellees was so intimately connected with that of steamboat navigation and so necessary to it as to fall within the exception of the proviso to the statute. We do not understand

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that a railroad company or a steamboat is bound to transact business on the Sabbath merely because the statute permits it to be done, but if they hold themselves out to the public as so doing and enter upon business, which according to their usage and habits will be transacted on that day, they cannot shield themselves for either misfeasance or nonfeasance, because it was done or omitted to be done on the Sabbath.

We dissent from the proposition advanced by appellant that the railroad company, being the agent of the appellees to deliver the cotton and having knowledge of the condition of the cotton yard at the time the cotton was deposited therein, was guilty of contributory negligence in depositing it there, and that the appellees, as the principal of the negligent agent, are also to be held guilty of such negligence; nor do we assent to the view that the railroad, as the agent of the shipper, selected the boats by which the cotton was to be transported. There is no fact disclosed by the record proving or tending to prove that appellees had any notice of the tripartite contract between the railroad, the appellant, and the steamers, under which they were accustomed to transport freights. By its contract the railroad company agreed with appellees to take their cotton at a stipulated price from the place of shipment to New Orleans, but was to be liable for losses only which might occur while the property was in its hands. The shippers had no interest in or knowledge of the contract it had made with other connecting carriers, but they had reasonable ground to believe and were justified in believing that the wharf-boat company, to whom the cotton was to be delivered to be forwarded by the steamer, and the steamer by which it should afterward be carried would exercise that degree of care and prudence that the law devolved upon them, and for a failure so to do would be responsible in damages. Under some circumstances it may be that a carrier is the agent of the shipper, but that relation does not exist under the contract here made to the extent claimed by the appellant. The contract was made between the railroad, for itself, the appellant, and the connecting carrier on the one part, and the shipper on the other. There is nothing in it from which can be inferred a power in the railroad as agent of the shipper to make a contract with the appellant which would relieve it from responsibility for its own negligence, or to bind the shipper by any contributory negligence of which the carrier railroad company might be guilty. The railroad

company was bailee of the shipper until it should deliver the cotton according to its contract to the wharfboat company, which then in turn assumed that relation under the contract of shipment, and with the relation it also assumed the duties and responsibilities which flowed from it according to the character of business in which it was engaged. While the cotton was in the hands of the railroad, it was bailee with the responsibility of a common carrier. When it reached the defendant it became bailee in turn, but only with the liability of a warehouseman, but this included responsibility for losses occurring by its neglect, against which the railroad had no authority to relieve it. Hutch. Carriers, § 12.

It is conceded by the appellee that the defendant under ordinary circumstances would have performed its duty by holding the cotton until the arrival of the Helena or Choteau if either should arrive within a reasonable time, and that it is not the unvarying duty of a warehouseman and forwarder to ship by the first opportunity. Their contention is that if by all the surrounding and accompanying facts and circumstances the warehousemen, as men of ordinary prudence, were admonished by the danger to which the property was exposed by reason of its liability to fire, it was appellant's duty to ship out the cotton by the first opportunity afforded, because to retain it in the yard endangered its safety. That it was dangerous to permit it to remain they contend was an inference that the managers must have drawn from the fact that the yard was in a crowded condition; that much of the cotton had been sampled and the combustible cotton drawn from the bales scattered around where men were in the habit of smoking, and where the engines of the railroad ran in drawing their cars into the yard; that the adjacent cabins occupied by laborers and the seed-house were sources from which accidental fires might be expected; that the oil mill and other buildings located within dangerous limits should also have been considered by the warehouseman, and if from all these danger from fire might reasonably have been feared, it was negligence to retain the cotton after the arrival of the Richardson.

We concur in the position thus assumed, and are of opinion that it was properly left to the jury to determine whether the defendants were guilty of negligence in failing to ship out the cotton by the opportunity afforded by the Richardson on Sunday; and this brings us to the final question in the cause.

The plaintiffs insist that a wrong-doer cannot apportion his own wrong, wherefore since but for the negligent act of the defendant in failing to ship the cotton by the Richardson (which failure the verdict of the jury was found to have been negligence), it could not have been destroyed by the fire, it is liable for the injury sustained; or in other words, that if the negligent act furnished the opportunity for the injury the defendant must respond in damages regardless of the immediate cause of the injury; or if mistaken in this, then the plaintiffs contend that if certain surrounding and attendant circumstances admonished the defendant that to retain the cotton would expose it to danger of fire from these sources, then if the fire did destroy it the defendant is liable even though it did not originate from those things which admonished of the danger, but occurred from a source from which no danger was or could have been reasonably apprehended.

It is contended for the defendant that if it be conceded it was negligent in not shipping out the cotton such negligence was the remote and not proximate cause of the loss, and *causa proxima non remota spectatur*.

It would be unprofitable to attempt an investigation of the very numerous, perplexing and contradictory decisions which have been made upon this much vexed subject; we have examined the cases cited by counsel, and find them to have been selected with discrimination and to fairly represent the conflicting views which prevail in different States. We have found no more intelligent and satisfactory deductions from the general course of decisions than the following propositions laid down by Mr. Cooley in his work on Torts:

1. That in the case of any distinct legal wrong, which in itself constitutes an invasion of the right of another, the law will presume that some damage follows as a natural, necessary and proximate result. Here the wrong itself fixes the right of action. We need not go further to show a right of recovery, though the extent of the recovery may depend upon the evidence.

2. When the act or omission complained of is not in itself a distinct wrong, and can only become a wrong to any particular individual through injurious consequences resulting therefrom, this consequence must not only be shown, but it must be so connected by averment and evidence with the act or omission as to appear to have resulted therefrom according to the ordinary course of events, and as proximate result of a sufficient cause.

3. If the original act was wrongful, and would naturally, according to the ordinary course of events, prove injurious to some person or persons, and does actually result in injury through the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which are innocent; but if the original wrong only becomes injurious in consequence of the intervention of some distinct wrongful act or omission by another, the injury shall be imputed to the last wrong as the proximate cause and not to that which was more remote. Cooley Torts, 69.

We accept the second proposition, assuming that the words "according to the ordinary course of events" include not only those consequences which necessarily and invariably follow from known causes, but those which may and probably will follow.

The verdict of the jury has established for the purposes of this examination the fact that the circumstances existing at the time when the cotton might have been shipped from the yard were such as to warn the defendant it was dangerous to keep it there and that it was guilty of negligence in so doing. If the fire had resulted from those circumstances which were relied on by the plaintiffs as indicating the danger to which the property was exposed, or either one of them, the defendant would have been responsible for the loss; but it does not follow that because the injury resulted from fire and the defendant was admonished of danger from fire, it is to be held responsible. The inquiry returns, was it a fire from which a reasonably prudent man would have anticipated danger? To illustrate: if a bailee should deposit the goods of the bailor near the walls of a building which was toppling and threatening to fall and the wall should fall and injure the property, he should be answerable, for it was his duty to have avoided the danger; but if the dangerous building do not fall and another building, from which no danger could reasonably be anticipated, unexpectedly fall and injure the goods, here he is not answerable though the injury has resulted from a like cause, the falling of a wall, for the wall which fell fell not according to the ordinary or probable course of events, but unexpectedly.

In *Morrison v. Davis*, 20 Penn. St. 171; 57 Am. Dec. 695, a carrier by canal used a lame horse in pulling his boat by reason of which it was delayed, and because of the delay it was subjected to flood whereby the goods were injured. It was held that he was not liable for the reason that he could not foresee the danger. In

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McGrew v. Stone, 56 Penn. St. 440, the owner of a coal boat anchored in a dangerous part of the stream in the vicinity of many other boats; one of his boats was injured, and sinking floated under the boat of plaintiff, which upon the subsiding of the waters, settled upon it and was lost. It was held to be a question of fact to be decided by the jury whether, under all the circumstances, the defendant should have anticipated the probability of danger to the boat of the plaintiff, the court saying: "If he knew that barges filled with coal are ponderous, unwieldy and difficult of control, are liable to injury and easily sunken, and that the place of mooring by reason of the strength of the current and floating drift was one of danger and most likely to cause such boats to sink, and also knew that this place in case of the sinking of his boat was likely to prove to be dangerous to some of the boats lying below and that the flood would come — for it was his purpose to await its coming; to carry him out — it could scarcely be held that these circumstances did not indicate to his mind the great danger of mooring there, and if an accident should happen there the danger to which it would expose others. The injury under such circumstances would not be so remote that it ought not to be taken into account. But it must be observed that these are inferences of fact which belong to the jury, whose province it is to determine what are the circumstances and the inferences of probability to be drawn from them."

It is unnecessary to pass upon the numerous instructions given for the respective parties. What we have said will indicate sufficiently our view of the principles upon which the case ought to have been tried. If the danger of fire from the oil mill was such that a reasonably prudent man would have considered it as affording a reason for not keeping his own property in a yard located as was that of the defendant, or if it was one of a number and the surroundings taken as a whole made up a danger from fire, originating in or proceeding from the mill too great to make the keeping of the cotton the act of a prudent man, then though there were other circumstances more calculated to awaken alarm from which the fire did not arise, the cause is not too remote to be considered. But if the mill was not a cause of reasonable apprehension of a fire so originating or proceeding, either of and by itself, or taken in connection with other surroundings, the defendant would not be responsible for the result of an unexpected fire originating therein.

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merely because other and distinct circumstances from which no harm actually came admonished it of the danger of a fire.

In the court below the jury was in effect told that if the condition of the yard, the proximity of the cabins and the seed-house; the habit of smoking indulged in by those visiting the yard and the fact that the engines ran into the yard, warned the defendant of the danger of fire, then if a fire occurred, though not originating from either of these sources and though neither of these contributed to the loss, the defendant was responsible therefor. This is an erroneous view of the liability of the warehouseman and imposed responsibility on him regardless of the fact that no danger could reasonably have been found from the source of the fire. Whether a fire from that source should have been anticipated by a reasonably prudent man was an inference to be drawn by the jury from all the facts in evidence.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

GILMER V. MORRIS.

(80 Ala. 78.)

Pledge — of stocks — right to redeem — unreasonable delay.

Stock was pledged in 1871, the pledgee advancing money on it from time to time while its value fluctuated from twenty cents on the dollar up to, but never more than the amount advanced. In 1881 the pledgee sold it for less than the amount advanced. In 1884 the pledgor sought to redeem and to hold the pledgee accountable for its value, greatly appreciated after the sale. *Held*, that his bill should be dismissed on account of the staleness of the demand.*

BILL for an account and redemption of stocks. The opinion states the case. The bill was dismissed below.

David Clopton, Gunter & Blakey, for appellant.

Troy, Tompkins & London, Watts & Son, contra.

SOMERVILLE, J. The view of this bill most favorable to complainant is that of one filed for the purpose of redeeming certain shares of corporate stock alleged to have been deposited with the defendant by way of pledge or collateral security, or more accurately speaking, to hold the defendant liable for the appreciated

* See *Wright v. Paine* (62 Ala. 340), 84 Am. Rep. 24; *Castner v. Wolrod* (83 Ill. 171), 25 Am. Rep. 369.

value of the stock upon the ground that he had sold it without authority and without any notice to the complainant, who claims to be the owner and the pledgor. It is very questionable however whether the allegations of the bill will bear this construction if subjected to proper criticism and construed with requisite strictness against the pleader. The deposit of stock is averred and proved to have been made in the early part of the year 1871. The bill was filed on the 7th day of July, in the year 1884, or more than thirteen years after the original deposit. There is neither averment nor satisfactory proof of any recognition on the defendant Morris' part, of any existing trust relationship between himself and the complainant intermediate between the time of the original transaction and the filing of the bill. In the year 1881 the defendant sold the stock in controversy, it being then of less value than the amount of his pecuniary demands claimed to be secured by it. After that time it appreciated rapidly in value and is shown by the evidence to have reached eight times its par value.

The bill was, on the hearing of the cause, dismissed by the chancellor as barred by lapse of time and the complainant brings this appeal.

It is our opinion, after a very careful consideration of the law and facts of the case, that the bill was wanting in equity as an attempt to enforce a stale demand and that the decree was free from error. Considering the transaction in the first place as a mere ordinary pledge of stock, rather than as partaking of the nature of both a pledge and a mortgage as it may well be construed to be, we nevertheless deem the complainant's right of redemption to be barred by the lapse of time.

It is true that we find the rule declared in the old books and reiterated in many adjudged cases, ancient and modern, that if no time of redemption is fixed by the parties the pledgor has his lifetime within which to redeem, unless quickened by notice or through the intervention of a court of equity. This principle however is not in harmony with the more modern, and as we consider the sounder and better rule, which is to exact of all claimants in cases of this character, analogously to the redemption of mortgages, the exercise of reasonable diligence in the enforcement of their equitable demands at the risk of being debarred of all relief. It may be, as often said in the text-books, that strictly speaking, the statute of limitations does not run against a pledgor in an ordinary

case of pledge, unless there is shown to be an adverse possession by the pledgee brought home to the knowledge or notice of the pledgor. But staleness of demand, which is a defense peculiar to courts of equity, rests on another, though no doubt analogous principle, which is to visit on one who sleeps on his rights, the fruits of his own negligence and infirmity of purpose. 2 Story Eq. Jur., § 1884. The doctrine of staleness may properly be said to be "founded in its origin upon a sound public policy which has a just regard for the preservation of the peace of society. It is of the utmost moment that there should be some end to law suits, an unreasonable encouragement of which is disastrous to the welfare of any government. Hence reasonable diligence in the assertion of one's rights in the courts is properly exacted, not less than the exercise of conscience and good faith." *Nettles v. Nettles*, 67 Ala. 599.

The growing importance of trade and commerce, with the increase of the means of rapid transit and speedy communication, have tended in modern times to shorten the period allowed by courts of equity beyond which a demand is considered stale on the ground of *laches*. The common law is no rigid system of unbending iron rules, but the elasticity of its principles is daily yielding to the growing wants of an advancing civilization. A rule of absolute repose has accordingly been adopted, in comparatively modern times, which is applicable to all human transactions open to judicial investigation, and by common consent is fixed to a period of twenty years. *Garrett v. Garrett*, 69 Ala. 429. The doctrine of staleness accommodates this rule to the equities of each particular case. If it were otherwise, the numberless mercantile and other transactions of our populous towns and cities would in due course of time oppress the courts with a burden of litigation which they would be incapable of enduring. No sound reason is perceived why the redemption of pledges should constitute an exception to this salutary principle. There is nothing in the relation of pledgor and pledgee which makes an invasion of the general rule as applicable to them either proper or desirable. And such, in our judgment, is the current of authority among the law-writers and especially the more recent ones. We accordingly find in Story on Bailments the principle asserted, that while prescription or the statute of limitations does not run against a pledgor's right of redemption, yet that "after a long lapse of time, if no claim for redemption is made, the right will be deemed to be extinguished

and the property will be held to belong absolutely to the pawnee." "Under such circumstances," it is added, "a court of equity will decline to entertain any suit for the purpose of redemption. A like rule is adopted in the common law in cases of mortgages." Story on Bailments (8th ed.), § 346. So in the recent treatise of Mr. Schouler on Bailments, after asserting that modern prescription, as applicable to pledges, runs rather by lapse of years than the uncertain span of human life, and that "time puts an absolute barrier to the pursuit of all such remedies, irrespective of the living or dead," the author further observes: "Strictly speaking, the statute of limitations does not run against a pledge; but inasmuch as it runs against the pledgee's enforcement of the secured debt or engagement, so will equity decline to entertain the pledgor's bill for redemption if he or his representative bring it unreasonably late; for the property will then be conclusively presumed to have vested in the pledgee." Schouler Bailments, 225. The same principle is recognized by other authorities, in language but slightly different. Wood Lim. Actions, p. 54, § 22; *McClenny v. McClenny*, 9 Tex. 192; 49 Am. Dec. 738; *Whelan v. Whelan*, 26 Ohio St. 131; *Colebrooke Coll. Securities*, § 132. In *White Mountains R. Co. v. Iron Co.*, 50 N. H. 57, the reason for extinguishing the pledgor's right to redeem, in such cases, seems to have been placed on the theory that an unreasonable delay in asserting it "raises the presumption that the pledgor has relinquished his title in satisfaction of the debt." Another and perhaps equally good reason is, the running of the statute of limitations against the pledgee operating to bar the enforcement of his debt against the pledgor personally. Schouler Bailments, 224, 225. This is upon the principle that courts of conscience favor the feature of reciprocity in its enforcement of equitable rights.

What lapse of time shall be regarded as rendering a pledgor's right of redemption stale cannot of course be formulated into any fixed rule applicable to all cases. Each case must necessarily depend upon its own circumstances, having regard not alone to the mere question of time, but also to the circumstances and relative situation of the parties, the nature of the property pledged, whether stationary or fluctuating in value, and other facts affecting the justice or equity of the right asserted. It is therefore, as said by Mr. Schouler, "largely a matter of judicial discretion." Schouler Bailments, 225, note 2. It is not questioned, so far as we know.

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by any authority, that the pledgor may always claim at least the period of six years, or the full period of time during which the pledgor is permitted to sue upon his secured debt or engagement. In *Humphries v. Terrell*, 1 Ala. 650, it was held that the right of both a pledgor and of a mortgagor to redeem personal property would be barred in six years; and the plea of the statute of limitations of six years in that case was held good as a bar to the pledgor's right to redeem, without any positive evidence of an adverse possession. There is other respectable authority for the same view. But this case in the phase of it now under consideration, does not necessarily require that we should carry the rule to this extent. The case of a mere pledgee, it is apprehended, is different, in some material aspects, from that of a mortgagee in possession, in whose favor the statute of limitations commences to run from the law day of the mortgage, because of his presumed adverse holding from that time. *Byrd v. McDaniel*, 33 Ala. 18; *McCoy v. Gentry*, 73 id. 105. All that we need say on this particular phase of the case is, that the pledgor will be barred by delaying for an unreasonable length of time, which must be determined by the varying facts and equities of each particular case. In *Waterman v. Brown*, 31 Penn. St. 161, the court refuses to grant relief, on a bill filed for the redemption of certain shares of bank stock, after the lapse of eleven years, the stock having in the meanwhile risen in value. The court, adopting the rule announced in *Humphries v. Terrell*, *supra*, held that the plaintiff's equity was barred by a delay of six years after the debt fell due, a demand for the debt being presumed to have been made in a reasonable time. The stock there in controversy, as here, had been transferred to the defendant, and having remained for a long time of less value than the amount of the secured debt, it was deemed to have been abandoned in satisfaction of it by mutual acquiescence. "We should administer equity very badly," said LOWRIE, C. J., "if we should allow the plaintiff to treat the stock as the defendant's for so long a period and the debt as paid by it, and then to claim the benefit of a rise in value occasioned by no merit of his." So in *Robert v. Sykes*, 30 Barb. 173, it was held that a bill to redeem certain pledged stocks which had been transferred to the pledgee, on the books of the company must be within ten years from the time the secured debt became due, by analogy, no doubt, to the statute of limitations governing claims to personal property in courts of law.

It is well settled that a much shorter time will be allowed the pledgor within which to exercise the right of redemption where he seeks to make a profit out of the unexpected rise in the value of pledged stocks, than where he seeks merely to compel the pledgee to account for a surplus received by him from the sale of the stocks in ordinary cases. Schouler Bailments, 225. The case of *Hancock v. Franklin Ins. Co.*, 114 Mass. 115, cited and relied on by appellant's counsel, was obviously a case of the latter kind, and was determined, strictly speaking, rather on the ground of the statute of limitations than upon any alleged staleness of the demand. This rule of redemption is clearly analogous to the one which requires the exercise of any similar option in property, real or personal, to be put in action with reasonable diligence. There is something in the nature of fluctuating stocks which makes the principle especially just when applied to them. As said by Mr. Justice MILLER, in a recent case, decided by the Supreme Court of the United States, "the injustice is obvious of permitting one, holding the right to assert an ownership in such property, to voluntarily await the event and then decide, when the danger which is over has been at the risk of another, to come in and share the profit." *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587. The court observed further that while a different rule would apply to property not subject to rapid fluctuations in value, yet where property is of this character, courts require "prompt action in all who hold an option, whether they will share its risks, or stand clear of them."

These observations apply with great force to this case. The stock in question is shown, at one time during the period it was pledged, to have been worth as little as twenty cents on the dollar. At the time of its sale by the defendant it was not above par. When the bill was filed it had rapidly increased in value, and during the progress of the cause reached about eight times its par value, or nearly forty times the lowest rate to which it had once fallen. It is manifest, that in cases in like this, justice can be administered only by curtailing the period allowed for exercising the option of redeeming within bounds which reasonably conform it to the equities of the peculiar emergency.

Upon this state of facts we hold that the complainant's right of redemption was a stale demand, and must be deemed to have been barred by unreasonable delay in its assertion. Sleeping on his rights for so great a length of time constitutes a degree of laches now fatal to their enforcement.

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There is another analogous view of this case, incidentally adverted to by us above, and which is equally fatal to the maintenance of the bill. It is the defense of the statute of limitations of six years, the ground upon which the case was decided by the chancellor.

The transfer of the stock in controversy is something more than a mere pledge. It partakes of the nature of both a pledge and a mortgage, because the transferee holds both the possession and the title of thing transferred. The chief difference between a pledge and a mortgage is, that in the former possession is transferred, and in the latter title, usually unaccompanied by possession. No reason is perceived why the two forms of security may not be combined in one as is here done. *Carey v. Cavoros*, 96 U. S. 467, 477. In *Nabring v. Bank of Mobile*, 58 Ala. 204, it was said, *arguendo*, that a transfer of stock, like that in the present case, was rather a pledge than a mortgage, following the view expressed in *Wilson v. Little*, 2 N. Y. 442; s. c., 51 Am. Dec. 307. But the decision of this point was a *dictum*, inasmuch as it was immaterial and unnecessary, the same result following whether the transfer was construed to be the one or the other. In this aspect of the law, to which I am not averse, there can be no room for disputation as to the fact that the case made by the bill was barred in six years from the day of forfeiture, there being no proof of any recognition of the complainant's title within this period, and therefore a presumed adverse holding by the defendant. *Byrd v. McDaniel*, 33 Ala. 18; *Humphries v. Terrell*, 1 Ala. 650; *Waterman v. Brown*, 31 Penn. St. 161, *supra*; *Jones Chat. Mort.*, §§ 771-772.

The bill was properly dismissed, and the decree of the chancellor is affirmed.

Decree affirmed.

CLOPTON, J., not sitting.

GLENN V. SEMPLE.

(80 Ala. 159.)

Statute of limitations — breach of agreement to pay stock subscription.

When the terms of a subscription to stock of a corporation bind the stockholders to pay "in such installments as may be called for by said company, and one per cent at the time of subscription;" and the corporation, becoming embarrassed, executes a deed of assignment for the benefit of creditors, not having called in all the stock subscribed, the statute of limitations in favor of the stockholders, as to their unpaid subscriptions, does not begin to run until a decree is rendered by a court of equity under a bill filed by creditors, making an assessment and call for the unpaid subscriptions.

ACTION for stock subscriptions. The opinion states the facts. The defendant had judgment below.

Wm. S. Thorington, for appellant.

SOMERVILLE, J. The present action is brought for a certain portion of the unpaid subscription to the capital stock of the National Express Company, a body corporate organized under the laws of the State of Virginia. The action is instituted by the plaintiff, as trustee, duly appointed by a court of competent jurisdiction, and fully authorized to sue. No question arises as to the personal disability of the plaintiff to maintain the action, nor is the jurisdiction of this court, which clothed him with his authority to sue, in any wise challenged. The only point raised by the record is, whether the action is barred by the statute of limitations of six years, which is the period fixed in this State for commencing actions founded on promises not under seal.

The subscription in question was made by the defendant in the year 1866, by which he agreed to pay to the National Express Company the sum of \$1,000 "in such installments as may be called for by said company, and to pay one per cent at the time of subscription." The company was organized, and carried on business for many months, but becoming financially embarrassed, executed a deed of assignment, in September, 1866, conveying to certain trustees all of its property, including unpaid subscriptions to its capital stock, for the purpose of securing its creditors. In December, 1871, a creditor's bill was filed in the Chancery Court at Richmond, the

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proceedings of which show proper jurisdiction of the subject-matter and of the parties, praying for the removal of the trustees appointed in the deed of trust, and the substitution of others in their stead; that the liabilities of the company be ascertained, and an assessment be made by authority of the court upon the unpaid capital stock for the purpose of discharging these liabilities. The court assumed jurisdiction of the cause and granted the prayer for relief, the plaintiff, as we have said, being substituted as trustee, and authorized to execute the trust. It being ascertained further that there remained uncalled for and unpaid the sum of \$80 or eighty per cent on each share, it was ordered and decreed by the court, on December 14, 1880, that thirty per cent of the par value of each share of said stock be assessed and called for, this sum being required to pay the debts of the company.

Under this state of facts, the court below gave the general charge for the defendant, evidently adopting the view contended for by appellee's counsel, that the statute of limitations commenced to run in favor of the stockholders from the date of the execution of the deed of assignment by the company, of the year 1866.

It is insisted on the contrary, by the appellee's counsel, that the statute did not commence to run, by the terms of the subscription, until the assessment and call were made under authority of the Chancery Court; and that the charge of the Circuit Court was for this reason erroneous.

We are unable to resist the conviction that the latter view is the correct one, as better supported both by the test of reason and the weight of authority.

It may be regarded as axiomatic that it was the duty of the directors of this corporation, as faithful fiduciary agents, to administer with fidelity the trust which they had assumed. Among the plain duties imposed upon them by law was, to see that the property of the company was honestly appropriated to the payment of its just debts. The unpaid subscription to stock was a trust fund in their hands pledged for this purpose. They had the lawful authority to make a call for so great a percentage of these subscriptions as was needed to discharge these corporate liabilities, and their duty was commensurate with their power. This duty, it is made to appear, they neglected to perform. And in view of such negligence and wilful inaction on their part, it devolved upon a court of equity, on proper application, to afford the requisite re-

lief. It is a part of the inherent and original jurisdiction of such courts to compel the execution of trusts, and no plainer or more conspicuous illustration of this principle can be found than the frequent cases in modern times, where they have, by a strong arm, coerced the proper application of the assets of insolvent corporations to the satisfaction of their debts. It is now, accordingly, well settled that courts of equity may enforce the payment of stock subscriptions, where the directors have neglected or refused to make assessments and calls for them in the exercise of their proper fiduciary duty. *Glenn v. Williams*, 60 Md. 93; *Sawyer v. Upton*, 91 U. S. 56; *Hall v. U. Ins. Co.*, 5 Gill, 484; *Hatch v. Dana*, 101 U. S. 205; *Adler v. Milwaukee Bank Co.*, 13 Wis. 61; *Ward v. Griswoldville Manfg. Co.*, 16 Conn. 593; *Dalton, etc., R. Co. v. McDaniel*, 56 Ga. 191.

But we do not understand the existence of this power in a court of equity to be seriously controverted. The point of contestation relates rather to the legal effect of its actual exercise, after it has been put in operation by a court of competent jurisdiction.

The question as to when the statute of limitations commenced to run depends, in this case, upon a proper construction of the contract of subscription. The promise of the defendant was to pay in such installments as may be called for by the board of directors of the company — which means in such sums and at such times as they might thereafter declare to be necessary. After the first assessment had been made and called in, it could not be known that any further call would ever be made. If the business of the company prospered, no further payments might probably be needed. But if bad management characterized its operations, or disaster beset it for any reason, such a call would be imperatively required. The defendant's contract therefore was not to pay absolutely or at all events, but upon a contingency — this contingency to be determined by the directors of the company, who were the mere agents of the stockholders, or in the event of their neglect or refusal to act, by the decree of a Court of Chancery.

The settled rule is, that where money is to be paid, or a thing is to be done, upon the happening of a contingency, or uncertain event, no cause of action accrues, and therefore no limitation can run until the contingency happens, or the event takes place. The clear reason is, that until then there is no breach of the contract, the obligation of the promise being in the meanwhile suspended.

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1 Add. Cont., §§ 406, 407; Angell Lim., §§ 113-115; 2 Pars. Notes & Bills, 639-644.

This rule has been frequently applied by the courts to actions for unpaid subscriptions for stock like the one in hand. In *Glenn v. Williams*, 60 Md. 98, where precisely the same point now before us was under consideration, in a similar action brought by the same plaintiff, it was held by the Court of Appeals of Maryland that the statute of limitations began to run only from the time of the assessment made by the decree of the court in Virginia. It was observed, that after the payment of the first assessment, there was nothing due from the subscribers "until an authorized call was made for the residue." "The contract," said ALVEY, J., in his most learned and able opinion, "contemplated the exercise of judgment and discretion on the part of the president and directors as to the times and amounts of future payments on the stock, and there was nothing due from the stockholders until such amounts were determined on, and regularly called for. Until a regular call made, there was no unconditional liability on the part of the stockholder to pay. Until then he could not know when to pay, or how much he would be required to pay. The subscription therefore was conditional as to the times and amounts of payments, and consequently there was no fixed obligation of the stockholder to pay, and no right of action against him, until an assessment and call made, either by the president and directors, or by the order of a court of competent jurisdiction."

In *Scovill v. Thayer*, 105 U. S. 148, we have a strong authority holding the same view. After announcing the doctrine, that where the company neglects or refuses to make the call, a court of equity will do so, if the interests of the creditors require, the court said: "But under such circumstances, before there is any obligation upon the stockholder to pay without an assessment and call of the company, there must be some order of a court of competent jurisdiction, or at the very least, some authorized demand upon him for payment, and it is clear," concludes the court, "the statute of limitations does not begin to run in his favor until such order or demand."

In *Savage v. Medbury*, 19 N. Y. 82, the suit was by the receiver of an insolvent insurance company upon a premium note, payable in such portions and at such times as the directors might require. It was held that no action could be maintained on the note without

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a previous assessment, agreeable to the terms of the subscription. And this ruling is followed by subsequent cases in that State: *Howlands v. Edmunds*, 24 N. Y. 307; *Howland v. Cuvendall*, 40 N. Y. 320.

In *Gibson v. Columbia, etc., Bridge Co.*, 18 Ohio St. 396, the suit was on an unpaid subscription to corporate stock made about sixteen years previously. It was held that the cause of action did not accrue, nor consequently, the statute of limitations commence to run, until a call was made by the company. To the same effect is *Kilbrath v. Gaylord*, 34 Ohio St. 305.

There are a large number of adjudged cases in other States supporting the same principle, to which we refer merely, without comment. *Sinkler v. Turnpike Co.*, 3 Penn. 149; *Bigelo v. Libby*, 117 Mass. 359; *Macon & Augusta R. Co. v. Vason*, 52 Ga. 326; *Hope Mut. Ins. Co. v. Weed*, 28 Conn. 51; *Warner v. Boom*, 86 Iowa, 386; *Western R. Co. v. Avery*, 64 N. C. 491.

In *Curry v. Woodward*, 53 Ala. 370, where the effort was to subject an unpaid subscription of stock to the process of garnishment at the instance of a judgment creditor of an insolvent insurance company, the subscription was payable at such times and in such amounts as should be called for by the board of directors. Upon a plea by the defendant that the debt was barred by the statute of limitations, it was said that the statute would not begin to run "until the call was made, or there was an evident disbandment of the company and relinquishment of the business." The most cursory reading of the case shows that this observation was a *dictum* so far as the latter proposition embodied in it is concerned. It was not a point involved in the case nor was it necessary to be decided. In the present case however it is not made to appear that there has been any disbandment of the company in the sense of affecting its corporate integrity or effecting its dissolution. We cannot see that the cessation of business by the company and the assignment of its assets can operate on any just principle to set in motion the running of the statute of limitations in favor of stockholders. It is true that this state of facts may prove the necessity for calling in unpaid subscriptions for stock in order to liquidate any outstanding corporate liabilities, but in no sense is it tantamount to an actual assessment and call either by the directors or by a court of competent jurisdiction. The failure of the directors to make such assessment and call is, as we have said, a failure to discharge their duty.

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They are the agents and representatives of the stockholders and their dereliction of duty may be justly visited upon their principals. As against the creditors of the company who have created their debts upon the faith of these subscriptions for stock, the stockholders ought not to be permitted, in our judgment, to take advantage of this wrongful act, this misfeasance of their own constituted agents. The law allows no man to reap a reward from his own wrong any more than it permits him to stipulate for iniquity. The one is as unconscionable as the other. The practical operation of such a principle would be fraught with great evils by affording a patent for the easy extinguishment of corporate debts. All that need be requisite would be the making of a general assignment and the postponement of suits against stockholders by protracted litigation in chancery for a period of six years. The present case, with its history of expensive litigation in all its varied and numerous forms extending through so many years, is itself an unanswerable refutation of the proposition contended for by the learned counsel for the appellee.

It is our opinion, that in this case the statute of limitations did not commence to run in favor of the defendant until the decree of the Chancery Court of the city of Richmond ordering the assessment and call for thirty per cent of the unpaid subscription for stock, which was on the 14th day of December in the year 1880. This date being less than six years before the bringing of the action, no bar had accrued, and the charge of the court was consequently erroneous.

It may be proper to add in conclusion that there is a class of cases not to be confounded with the present one although somewhat analogous to it. Of this class *Hatch v. Dana*, 101 U. S. 205, is an example. There a creditor's bill was filed by a judgment creditor of a corporation seeking to coerce payment out of the unpaid stock subscriptions. It was held that the bill could be maintained although there had been no calls for them by the company, the court treating the debts as due without further demand. But it was observed that this was true only "as between the debtor and the creditor of the corporation," the court of equity in such cases pursuing its own mode of collection within the limits of doing justice to the debtor. It needs no argument to show that the two classes of cases are easily distinguishable on sound principles.

Judgment reversed and cause remanded.

BELLINGER V. GLENN.

(30 Ala. 190.)

Negotiable instrument — action for protest after waiver.

The drawee of a bill of exchange cannot maintain an action against the holder for protesting the bill after waiver of protest by drawer and indorsers.*

ACTION for damages for wrongful protest. The head-note shows the point. The defendant had judgment below.

Dunlap & Dortch and Aiken & Martin, for appellants.

W. H. Denson and James L. Tanner, for appellees.

CLOPTON, J. To give a right of action for a tort, the act complained of must be wrong in itself or become so by reason of the consequences which ensue. With whatever intent an act may be done, it cannot be the foundation of an action, unless it constitutes a legal injury. "Whatever one has a right to do, another can have no right to complain of." The waiver of protest and notice applied only to drawers and indorsers. It conferred no right on the plaintiffs, who had not accepted the bill and were not parties to it, and imposed no duty on the defendants as to them. It is lawful for the holder of a bill, notwithstanding protest may be waived, to have it protested, if he deems such advisable, or desires to claim the statutory damages for non-acceptance or non-payment. On the allegations of the complaint, the protest was not a wrong to the plaintiffs, could not have done them any damage, and gave them no right of action. The substantial elements of a cause of action — wrong and damage — are wanting.

Judgment affirmed.

* See *Wittich v. First Nat. Bk.* (30 Fla. 848), 51 Am. Rep. 631.

Western Union Telegraph Company v. State Board of Assessment.

WESTERN UNION TELEGRAPH COMPANY V. STATE BOARD OF ASSESSMENT.

(80 Ala. 273.)

Constitutional law — taxation — of gross receipts of telegraph companies.

The Constitution provides that all taxes shall be assessed in exact proportion to the value of the property, and shall not exceed one per cent of such value. A statute provides for a tax of two per cent on the gross amount of receipts of telegraph companies. *Held*, not an infringement of the said constitutional provision, nor of that of the Federal Constitution as to inter-State commerce.

CERTIORARI to set aside tax. The opinion states the case.
Dismissed below.

Gaylord B. Clark and Thomas G. Jones, for appellant.

CLOPTON, J. Subdivision 6 of section 6 of the Revenue Law levies a tax of two *per centum* "on the gross amount of the receipts by any and every telegraph, telephone, electric light and express company, derived from business done by it in this State." Acts of 1884, 1885, p. 10. The constitutionality of the statute is the material point of contestation, which question we shall consider on account of its importance to both the State and the tax payer, pretermittting any expression of opinion as to the appropriateness or regularity of the proceedings. Appellant contends the statute violates section 1 of article 11 of the Constitution, which requires that "all taxes levied on property in this State shall be assessed in exact proportion to the value of such property;" and also section 4 of the same article, which provides, "The general assembly shall not have the power to levy, in any one year, a greater rate of taxation than three-fourths of one *per centum* on the value of taxable property within this State."

Prior to the Constitution of 1865, the only limitations on the power of taxation were, that no one shall be obliged to pay any tithes, taxes or other rate, for the building or repairing of any place of worship, or for the maintenance of any minister or ministry; that no power to levy taxes shall be delegated to individuals or

private corporations; and taxes shall not be levied for their benefit, without the consent of the tax payer. The *ad valorem* rule was first introduced, and then only applicable to real property, in the Constitution of 1865, by the mandate, "All lands liable to taxation in this State shall be taxed in proportion to their value." On personal property taxes could be imposed as the legislature might consider most expedient. The rule was extended, and its application enlarged in the Constitution of 1868, by incorporating therein an article providing, "All taxes, levied on property in this State, shall be assessed in exact proportion to the value of such property;" and also a prohibition that the general assembly shall not have power to authorize any municipal corporation "to levy a tax on real and personal property to a greater extent than two *per centum* of the assessed value of such property." The provision of the Constitution of 1868, first quoted, entered *in totidem verbis* into the present Constitution, with a super-added prohibition as to the rate of taxation to be levied by the general assembly; and the rate authorized by municipal corporations was reduced. There are other provisions relating to taxation in the two later Constitutions, which it is unnecessary to note, as they have no material bearing on the question under consideration.

Having been taught by experience that no legislative power is more liable to oppressive use than the taxing power, and having suffered evils by resting it too broadly on discretion, the people have shown, in the history of the successive Constitutions, a progressive policy to restrain the power of the legislative department in this respect, and to remedy existing, and guard against apprehended evils, by imposing limitations consistent with the public needs and the public safety. The just expositor, in interpreting the constitutional mandates and inhibitions, will consult the changes, that have been made from time to time, the causes which produced them, and the mischief intended to be remedied. The words used should be allowed such operation and force, as will reasonably accomplish the purposes proposed, but without extension beyond their legitimate meaning, and so as to avoid embarrassing and disabling proper governmental administration. Thus considered and interpreted, do the provisions of the Constitution apply to every subject of taxation, to which resort is usually, and may be legitimately made, to raise money for public purposes and needs, or only to direct taxation on property as such, by prohibiting an arbi-

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trary, specific standard, and requiring assessment in proportion to its value? Was it intended to limit the subjects of taxation, or only to prescribe the mode of assessing the taxes when levied on a particular subject?

Fortunately we are not without aid in interpreting these provisions. Substantially similar provisions were contained in the Constitutions of some of the other States, which had received judicial construction, prior to their incorporation in either of our Constitutions. The Constitutions of California, Texas, Virginia, Louisiana, Illinois, Ohio and other States, contain similar or equivalent provisions, which had been construed not to prescribe a limit as to the subjects of taxation, but as intended to prohibit an arbitrary taxation of property, as to kind or quality, without regard to value. *People v. Coleman*, 4 Cal. 46; 60 Am. Dec. 581; *Eyre v. Jacob*, 14 Gratt. 422; s. c., 73 Am. Dec. 367; *Sawyers v. City of Alton*, 3 Scam. 127; *Aulanier v. Governor*, 1 Tex. 653; *Baker v. Cincinnati*, 11 Ohio St. 534. In *Aulanier v. Governor*, *supra*, it is said: "The word 'property,' as used in the Constitution, cannot, by any forced construction, be tortured into meaning an occupation, calling or profession." In *Glasgow v. Rowse*, 43 Mo. 479, WAGNER, J., says: "That taxes should be uniform, and levied in proportion to the value of the property to be taxed, is so manifestly just, that it commends itself to universal assent. But notwithstanding the constitutional provision, there are some kinds of taxes that are not usually assessed according to the value of property, and some which could not be thus assessed; and there is perhaps not a State in this Union, though many of them have in substance the same constitutional provision, which does not levy other taxes than those imposed on property. * * * It therefore seems plain, that the constitutional requirement, that 'taxation upon property shall be in proportion to its value,' does not include every species of taxation; nor indeed would it be possible to place such an interpretation upon it without doing the grossest injustice." In *Burroughs on Taxation*, § 54, referring to such limitations, the author observes: "These provisions, as a general rule, are held to apply to property alone, and not to include taxation on privileges or occupations, or upon the exercise of a civil right, as taking by devise or descent." *Cooley Const. Lim.* 619; *Western U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *State v. Western U. Tel. Co.*, 63 Me. 518.

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It is conceded that the word property is sometimes employed in the revenue law in its comprehensive sense, and as synonymous with subjects; and will be so construed, when required by the context, or when the manifest purpose of the law will be otherwise defeated. Such is the case of *Lehman v. Robinson*, 59 Ala. 319. Being used in more than one sense, the inquiry is, in what meaning is it employed in respect to the levying of taxes? If there be nothing showing a different intention, words ordinarily are to be taken in their usual and familiar import; and when general and continuous usage in legislation respecting a particular subject-matter has imparted a particular meaning, subsequent use of the same word in legislation relating to the same subject-matter creates a reasonable inference that it was intended to be employed in the same sense, there being nothing in the context showing a different intention. Taxes are not levied upon the right a man may have to any thing—the right of possession, use, enjoyment, and disposition, which is property taken in its legal and technical signification, but upon the subject of these rights. Therefore in specifying the subjects, generally, an obvious distinction is recognized and maintained between property taxed as such and the other subjects of taxations. In *Lott v. Rose*, 38 Ala. 156, the question was, whether the authority conferred on the county of Mobile to assess and collect a tax, not exceeding twenty cents on each \$100 of taxable property within the county, conferred a power to levy a tax of twenty cents upon each \$100 of the gross amount of the sales of merchandise. The authority was claimed on the ground that the State revenue law assessed a tax on the gross amount of sales of merchandise, thereby constituting such sales taxable property. It was held that every subject of taxation, under the State laws, cannot be considered as embraced by the terms “taxable property” employed in the special act; and that in various sections of the general revenue law, the distinction between property made liable to taxes, and other subjects of taxation, is clearly drawn. It is said: “A tax upon the gross amount of sales of merchandise, under section 391 of the Code, is not a tax upon the goods themselves, or the fruits of the sale, but upon the business of the act of selling. This is not then a property or income tax, but an occupation or privilege tax; the amount being regulated by the extent to which the privilege has been enjoyed.” Property, when employed in connection with the assessment and levy of taxes had thus received a judicial interpre-

tation, which we must presume was in the contemplation of the framers of the organic law.

Not only were the provisions of the Constitution adopted in view of the judicial construction placed upon the meaning of "property," as used in the revenue laws several years previously, but the special matter of consideration was the necessity and expediency of restraining the power to tax, as conferred by the general grant of legislative power. The convention was advised that independent of special restrictions, the taxing power extends to "person, or property, or possession, franchise or privilege, or occupation or right;" and reaches every source of revenue and subject of taxation within the jurisdiction of the State, only limited by public purposes, and only restrained by the protection guaranteed to private rights against oppression; and that all the sources and subjects of taxation had been and were resorted to. Property always had been and was the main reliance for raising revenue. The apprehended evils and dangers of oppressive and arbitrary taxation were especially directed to this subject—property, tangible and visible, capable of being reached and easily confiscated. The *desideratum* was the protection of the property of the citizen against forced contributions or legislative plunder. Assessment in exact proportion to value is the mode and means of protection, with an added limitation on the rate of taxation. Hence the limitation in the Constitution of 1868, from lands to property as embracing the subjects of ownership, whether real or personal; and the same clause is brought into the present Constitution without any modification or change. With a knowledge of the various subjects of taxation; of the well-defined distinction between property, when made liable to taxes, and subjects of taxation; and that among such other subjects were occupations, privileges, business and licenses, which in the nature of things are incapable of determinate value, valuation was adopted as the basis and measure of assessment. The limitations by their terms signify an intention that the provisions shall be only applicable to property, the value of which is capable of definite ascertainment by the officer whose duty it is to make the assessment; and that all other subjects of taxation should be excluded from their operation. The language is: "All taxes levied on property in this State shall be assessed in exact proportion to the value of such property." The terms are restricted to property, as a species of the genus, "subjects of taxation. The

context shows that the word is employed in its usual and ordinary meaning, designating the thing owned, in the same sense in which it was generally used in the sections of the revenue laws, relating to the assessment and levy of taxes. The legal and logical sequence of the position of appellant would be, that the limitations operate to prohibit the levy of taxes on any subject, not susceptible of determinate value.

It is contended that if the word "property," as used in section one of article eleven, be construed as not synonymous with "subjects of taxation," the terms "taxable property," as used in section four of the same article, include any subject which can be taxed; and that the section forbids a greater rate of taxation on any subject than three-fourths of one per cent. If the terms of the section had been general — prohibiting a greater rate on any taxable property — without qualifying words, there would have been much force in the argument of counsel. But here also we find valuation constituting a basis on which the prohibition as to the rate rests, and by which it is determined. In *Lott v. Rose, supra*, these words were construed. It is said: "Where the words 'taxable property' occur in an independent act, it would seem that they should be understood in the sense of things taxed which are susceptible of ownership or possession, unless there is something in the context which affixes to them a different meaning, or unless the plain object of the law will be defeated, if they are not held to cover subjects of taxation which are not property in the ordinary sense." If so construed when employed in an independent act, *a fortiori*, such should be the construction when used in a section composing, with others, the article of the Constitution relating to the subject of taxation, all the sections of which being in *pari materia*, should be construed together. The framers of the present Constitution, experiencing that the limitation in the last preceding, requiring taxes levied on property to be assessed in proportion to value, was ineffectual to prevent oppressive taxation, connected therewith a prohibition as to the rate of taxation on such valuation. It may be considered that the gross receipts from business are property, in its strict meaning. In such sense it was undoubtedly employed in the majority opinion in *State Freight Tax*, 15 Wall. 284; the authority of which is weakened by the dissenting opinion, in which it was said, that the tax on gross receipts of railroad companies is a tax for the privilege of transportation. In *Lott v. Rose*,

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supra, it was held that a tax on the gross amount of sales of merchandise, which are gross receipts, is not a property or income tax, but an occupation or privilege tax, the amount regulated by the extent of the business done. In *Board of Revenue v. Gas Light Co.*, 64 Ala. 269, and in *State v. Board of Revenue*, 73 Ala. 65, the tax was imposed on the net income, and not on the business. The money, held and owned by the company, as the net result of the business, was the subject of taxation. An income tax stands on different principles; its value is determinable; and the rules governing such tax are inapplicable to a tax on gross receipts. One of the recognized modes of taxing business is a tax on gross receipts, which generally are not regarded as property for taxing purposes. *State v. P. W. & B. R. Co.*, 45 Md. 361; *Phil. Con. Ins. v. Commonwealth*, 98 Penn. St. 48; *Sacramento v. Crocker*, 16 Cal. 120; *Warring v. Savannah*, 60 Ga. 99; *Winby v. Girardy*, 31 La. Ann. 382. Taxable, as used in the fourth section, qualifies and designates property, not which it may be in the power of the legislature to make liable, but which is made liable, to taxation. The value of such property must be determined, before it can be ascertained that the rate of taxation imposed exceeds the rate limited by the Constitution. By what measure or *criteria* can the business be ascertained, which so largely depends upon the vigilance, energy and skill exercised in its prosecution? The gross receipts constitute no measure of value, for they may be large, and yet the business be valueless, by reason of losses, misfortune or mismanagement. Business, though made a subject of taxation, not being capable of determinate value, is not taxable property, in the meaning of the terms employed in the constitutional limitation of the rate of taxation.

It is further insisted, that the section of the revenue law under consideration is violative of the Constitution, in that the rule of equality and uniformity is disregarded, by putting an arbitrary value on the gross receipts of telegraph companies, and a different value on the gross receipts of other kinds of companies. The proposition, as stated in the argument of counsel is, "when income or gross receipts are taxed, everybody that is taxed in this State must be taxed alike." The fallacy of the proposition consists in the assumption, that the tax on gross receipts is levied by a standard of valuation, instead of by the character and extent of the business. Whilst there is no provision of the Constitution, commanding in terms equality and uniformity, the principle should underlie and

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regulate the provisions of every law imposing public burdens and charges. It is not controverted, that the taxing power may select the subjects of taxation, and constitutionally classify them. Taxes should be imposed on any subject, in just proportion to the benefits and protection which such subject receives more than other subjects of taxation. The rule of uniformity does not require that all subjects be taxed, nor taxed alike. The requirement is complied with, when the tax is levied equally and uniformly on all subjects of the same class and kind. It extends to the class upon which the tax shall operate. Different occupations may be taxed at different rates; and some may be altogether exempted; and the requirement of uniformity is not infringed, if the various classifications include all occupations similarly circumstanced and of the same kind. *Moog v. Randolph*, 77 Ala. 597; *State Railroad Tax cases*, 92 U. S. 575; *Worth v. Wel. R. Co.*, 89 N. C. 291; s. c., 45 Am. Rep. 679; 15 Am. & Eng. R. Cas. 286; *County of St. Mateo v. So. Pac. R. Co.*, 8 Am. & Eng. R. Cas. 1; *Cooley Taxation*, 170. The tax complained of may be onerous, and apparently unequal with the tax levied on the business of other corporations or companies. This is a matter submitted to the discretion and judgment of the legislature, and their action must be regarded as conclusive. The courts cannot interfere, unless an illegal or unauthorized exaction is attempted.

A construction which limits the tax to gross receipts derived from business done between points, both of which are within the territorial limits of the State, is more restrictive than the words and purpose of the statute import. The legislature knew that the appellant company operated extensive telegraph lines from places beyond, into and through the State, and intended to make the tax commensurate with the benefits and protection received from the government. Receiving messages at offices located in the State, for transmission, and transmitting them without, is business done in this State, though the service may not be complete until the delivery to the sendee at some place beyond its boundaries. The statute does not purport to tax gross receipts not collected in Alabama, but by fair interpretation, includes all receipts derived from business done in this State, and actually received here, though the message may have to be delivered at, or may be sent for delivery from some office without the jurisdiction of the State. Though thus construed, the statute is not an unauthorized interference with inter-State commerce. This question is fully and ably considered and discussed

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in the following cases: *Western U. Tel. Co. v. Richmond*, 26 Gratt. 1; *Western U. Tel. Co. v. State*, 55 Texas, 314; *Western U. Tel. Co. v. Mayer*, *supra*; *Port of Mobile v. Leloup*, 76 Ala. 401, and is expressly decided in respect to a tax on the gross receipts of railroad companies, though consisting in part of freights received for transportation of merchandise from the State to another State, or into the State from another, in *State Freight Tax* cases, 15 Wall. 284; *Osborne v. Mobile*, 16 Wall. 479. Further discussion would be superfluous.

Judgment affirmed.

BOLMAN V. OVERALL.

(80 Ala. 451.)

Will — in consideration of services — specific performance.

A will giving property to one in consideration of personal services rendered and to be rendered to the testator is valid, and may be enforced as a contract after the testator's death. (*See note, p. 111.*)

BILL for specific performance. The opinion states the case. The bill was dismissed below.

F. G. Bromberg, for appellant.

Overall & Bestor, contra.

SOMERVILLE, J. The appeal is from a decree of the chancellor, sustaining a demurrer to the bill of complaint filed by the appellants for specific performance. The complainants are the legatees under the will of one Augusta Lohman, which instrument purported to be executed in consideration of valuable services rendered to her in her life-time by the complainants, and was executed on December 1, 1881, and delivered to Mrs. Louisa Bolman, who was made executrix of the will, and residuary legatee therein, and is one of the complainants. In April, 1883, the testator executed another will in which she sought to revoke the previous one, with all of the legacies made under its provisions, and leaving her entire property to other beneficiaries. This will was duly probated, the defendant Overall being the executor therein, and the other defendants legatees.

but with full power on the part of the promisor to make any *bona fide* disposition of it during his life to another, otherwise than by will. The power to make such a will having been renounced, the attempt to exercise it is deemed a fraud on the rights of the promisee under the contract, thus bringing into exercise another ground of equity jurisdiction. As said by Lord CAMDEN in *Dufoor v. Per-ran* (quoted by Hargrave in his *Judicial Arguments*, vol. 2, p. 310), there is no difference between one's promising to make a will in such a form, and making such will with a promise not to revoke it. The courts do not set aside the will in such cases, but the executor, heir or devisee is made a trustee to perform the contract. *Wright v. Tinsbey*, 30 Mo. 389; *Lord Walpole v. Lord Orford*, 3 Ves. 402; *Rivere v. Rivere*, 4 Desaus. 190; s. c., 4 Am. Dec. 609; *Randall v. Willis*, 5 Ves., Jr., 262; *Johnson v. Hubbell*, 66 Am. Dec. 773, 787, note and cases cited; 1 Story Eq. Jur. (12th ed.), §§ 785-786; *Taylor v. Mitchell*, 87 Penn. St. 518; s. c., 30 Am. Rep. 383; *Logan v. McGinnis*, 12 Penn. St. 27; *Waterman Spec. Perf.*, § 41; *Green v. Broyles*, 3 Humph. 167; s. c., 39 Am. Dec. 156; *Shumaker v. Schmidt*, 44 Ala. 454. Mr. Schouler in his recent *Treatise on Wills*, § 454, lays down the rule, as deduced from the authorities, to be, that, "where one contracts upon valuable consideration, to execute a will after a certain tenor, the agreement is binding upon his death, and may be specifically enforced against his personal representatives and his estate." Mr. Parsons, after recognizing the validity and binding force of such agreements, and their incapability of literal specific performance, observes in his work on *Contracts*, that it has nevertheless "been held to be within the jurisdiction of equity to do what is equivalent to a specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms." "And," he adds, "the court will not allow this *post-mortem* remedy to be defeated by any devise or conveyance in the life-time inconsistent with the agreement." 3 *Para. Cont.* (7th ed.), §§ 406, 407. In *Waterman on Specific Performance*, section 41, it is said generally: "A person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, and a court of equity will enforce such an agreement by compelling the heir at law to convey the property in accordance with the terms of the contract; but such a contract, especially when it is attempted to be established by parol, is regarded with suspicion, and not sus-

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tained except upon the strongest evidence that it was founded upon a valuable consideration, and deliberately entered into by the decedent."

Under all of the best considered authorities, we are of opinion, that the contract, evidenced by the will, is one which is capable of being enforced against the executor and legatees under Mrs. Lohman's last will, they being declared to be trustees of the executor's property for complainant's benefit, unless some good reason is shown to the contrary, other than any appearing in the statements of the bill.

But for other reasons the decree of the chancellor sustaining the demurrer to the bill is affirmed.

Decree affirmed.

NOTE BY THE REPORTER — See *Caviness v. Rushton*, 101 Ind. 500; s. c., 51 Am. Rep. 759; *Johnson v. Hubbell*, 10 N. J. Eq. 382; s. c., 66 Am. Dec. 773; *Wellington v. Apthorp*, 145 Mass. 72. In *Parsell v. Stryker*, 41 N. Y. 486, the court said: "As to plaintiff's equities, it made no difference whether the agreement was to deed the farm at a future day, on performance by plaintiff, or to devise the farm by a will made in the life-time of the party, a court will decree the specific performance of the latter agreement after death, where otherwise objectionable, equally with a contract to convey while living.

"This case was fully considered and properly decided in *Johnson v. Huwoll*, in the Court of Chancery of New Jersey, in 1856, of which I find a report in the *American Law Register*, vol. 5, page 177. On this branch of the case Chancellor WILKINSON said: 'there can be no doubt but that a person can make a valid agreement to make a particular disposition of his property by last will and testament. The law permits a man to dispose of his own property at his pleasure; and no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual, or for a particular purpose, as well by will as by conveyance, to be made at some specified future period, or upon the happening of some future event. It may be unwise for a man to embarrass himself as to the final disposition of his property; but he is the disposer by law of his own fortune, and the sole and best judge as to the manner and time of disposing of it. A court of equity will decree the specific performance of such an agreement, upon the recognized principles by which it is governed in the exercise of this branch of its jurisdiction. *Rivers v. Rivers*, 3 Dessaus. 195; *Jones v. Martin*, 3 Amb. 883; 19 Ves. 66; 3 Ves. 412; *Podmore v. Gurnsey*, 7 Sim. 644 to 654."

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ALABAMA GOLD LIFE INSURANCE COMPANY V. JOHNSTON.

(30 Ala. 437.)

Insurance — warranty — when construed as representation.

SUFFICIENTLY reported, 59 Am. Rep. 820.

CITY COUNCIL OF MONTGOMERY V. TOWNSEND.

(30 Ala. 439.)

Constitutional law — eminent domain — injuring property — change of grade of sidewalk.

The Constitution requires corporations, authorized to take private property for public use, to "make just compensation for property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements." In an action against a city for injury to adjoining property by cutting down a sidewalk, *held*, that an instruction that the plaintiff was entitled to recover if his property was injured was error, because his right depended on whether the effect of the alteration was or was not reasonably within the purview of the original taking or dedication.

ACTION for damages to lots by cutting down a sidewalk. The opinion states the case. The plaintiff had judgment below.

Jones & Foulkner and W. S. Thorington, for appellant.

Thomas H. Watts and W. L. Briggs, contra.

CLOPTON, J. The action is brought by appellee to recover damages for injury caused to his property by cutting down, under the direction of the city council of Montgomery, the adjacent sidewalk in front thereof. The street on which the lot of plaintiff is situated is within the corporate limits of the city, was dedicated to the public more than half a century ago, and has been continuously used and recognized as a public street. The level of the other part of the street is and has been for many years from fifteen to twenty feet lower than the surface of the sidewalk on which persons entered from the street by ascending a flight of steps. The sidewalk having been for several months in an unsafe condition and dangerous to

passers thereon, the city council, upon the examination and report of the city engineer, ordered it cut down to the level of the street. The authority of the city council to cut down the sidewalk and the duty to do so, if necessary to put it in a safe condition, are not disputed. In the performance of the work there was no excavation or cutting beyond the width of the street as dedicated and originally constructed, and it is not claimed that a want of reasonable care and skill is shown. The plaintiff does not controvert the non-liability of the corporation for consequential damages in the absence of statutory or constitutional provisions imposing such liability. The contestation arises on the construction of the clause of the Constitution requiring municipal corporations to make just compensation for property taken, injured or destroyed, for public use.

The preceding Constitutions provided: "That private property shall not be taken or applied for public use unless just compensation be made therefor, nor shall private property be taken for private use, or for the use of corporations other than municipal, without the consent of the owner." The clause of the present Constitution now under consideration should be construed in the light of the provisions of its predecessors. Under such provisions, as construed by the courts, no liability for compensation accrued unless there was an appropriation, a taking or invasion, of the particular property. A municipal corporation was not liable to answer for consequential damages to the owner of property not taken when there was no want of reasonable care and skill. Acts done by such corporations, under valid legislative authority, exercising the power of eminent domain and not directly encroaching upon private property, did not constitute a taking in the meaning of the Constitution and did not entitle the owner to a right of action however much its value and use may have been impaired. The value of adjoining property might be seriously depreciated and even destroyed without right of compensation because unaccompanied by actual, direct, physical interference. In such case the protection of private property was sacrificed to the good or convenience of the community, and the individual loss or injury was regarded *damnum absque injuria*, to be borne by the citizen for the public benefit.

The practical operation of such general provisions having demonstrated that compensation only for property taken or applied was ineffectual to protect the citizen against oppression and injustice by reason of the abuse of the privilege with which corporations

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had been invested, in disregard of the interests and rights of the individuals, the tendency is in revising the several State Constitutions, to abrogate by the organic law a rule which has no foundation in natural justice and rests on no sound principle of just government or of equal administration of powers. Influenced by these considerations the framers of the present Constitution not only incorporated the general provision of the preceding Constitution, but also an additional and special provision having reference to municipal and other corporations and individuals invested with the privilege of taking private property for public use. Section 7 article 14 of the Constitution declares: "Municipal and other corporations and individuals invested with the privilege of taking private property for public use, shall make just compensation for the property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements, which compensation shall be paid before such taking, injury or destruction. The general assembly is hereby prohibited from depriving any person of an appeal from any preliminary assessment of damages made by viewers or otherwise, and the amount of such damages in all cases of appeal shall, on demand of either party, be determined by a jury according to law." This mandatory clause being a new provision, an extension for the protection of property, introduced into a revised Constitution, should be liberally construed in favor of the citizen, and so as to secure the purposes intended; as, ascertained from the considerations which produced its introduction. It operates a further limitation on the right of eminent domain, from which the State alone is excepted, and establishes a new rule, supported by better reason and founded in equal justice. The words injured or destroyed were not used in vain and without meaning. It was intended that they should have effect, and unless they operate to impose a liability not previously existing, they are without operation. The new rule proclaimed by the Constitution imposes a liability for private property injured or destroyed, though not taken, a liability for consequential damages from which municipal corporations were theretofore exempt. The construction has been placed on a corresponding clause of the Constitution of Pennsylvania by the Supreme Court of that State of which ours is a copy. *Redding v. Atthouse*, 93 Penn. St. 400.

A material question is, in what cases and under what circumstances does the Constitution impose the new and additional lia-

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bility? In this connection our consideration has been cited to the decisions of the courts of several of the States, as sustaining plaintiff's contention, that a municipal corporation is liable for the injury done to an abutting lot by any grading of an established street. By these decisions, it is substantially held, that the recent Constitution made no difference as to the form of the public use, and that an abutter is entitled to recover the consequential damages caused to his property by raising or lowering the grade of a street. *City of Elgin v. Eaton*, 83 Ill. 335; s. c., 25 Am. Rep. 413; *Reardon v. San Francisco*, 66 Cal. 492; s. c., 56 Am. Rep. 109; *Hannon v. Omaha*, 17 Neb. 548; *Atlanta v. Greene, Johnson v. Parkersburg*, 16 W. Va. 403. It should be remarked however that in the subsequent case of *Rigney v. Chicago*, 102 Ill. 64, where the same question came again before that court for consideration, three of the seven justices dissented, and the chief justice, who concurred in the conclusion, qualified the rule in a separate opinion. The provision in the Constitution of each of these several States is general and unrestricted; "private property shall not be taken or damaged for public use," without compensation. The presumption is reasonable that the convention which framed the Constitution compared and considered the recent Constitutions of other States. And it is significant, in view of the well settled rule respecting the liability of municipal corporations for damages done to adjoining lots not encroached upon, by changing the grade of the streets, or making other alterations, that the convention failed to ordain a provision general and unlimited, as provided in some of the Constitutions, operating to abrogate *in toto* the previously settled rule, and adopted the qualified provision of the Constitution of Pennsylvania as sufficient to meet the requisite protection of private property, and at the same time to answer the demands of public policy and public needs, on which is rested the right of eminent domain. In this there was a manifest intent, which has reference to the form of the public use—the restriction of the liability of two specified cases; "the construction or enlargement of its works, highways, or improvements." Unless the injury or destruction is produced by a construction or enlargement of some work, highway or improvement, which is a consequence of the use of the privilege of taking private property for public use, no liability for damages arises under the Constitution.

The next inquiry is, what is, in the meaning of the Constitution, a construction or enlargement of a highway? The purposes intended are, as ascertained from all the provisions of the section, to limit and qualify the right of eminent domain, making such limitation and qualification equally operative as to all corporations and individuals invested with the privilege. The section contemplates that the general assembly shall provide appropriate proceedings for the pre-ascertainment of the damages, protects the right of appeal from the preliminary assessment, and of having the damages assessed by a jury, and requires that the compensation shall be paid before such taking, injury or destruction—provisions only applicable and appropriate in case of a resort to the right of eminent domain. In all other cases the liability of the municipal corporation remains dependent on common-law rules, or statutory provisions. *Edmundson v. Pittsburg*, 111 Penn. St. 316; s. c., 23 Am. & Eng. R. Cas. 423. Having reference to the subject with which the Constitution was dealing, there are three interpretations open—to restrict the construction of a highway to its primary meaning, excluding subsequent alterations; or to extend it and include all alterations without reference to the primary construction; or only to a class of changes which may be regarded as separate and distinct uses of the right of eminent domain as distinguished from the first taking or injury. We think that the last meets most fully the purposes of the Constitution.

In laying out a town or city into lots, streets are absolutely necessary as a means of access, without which approach and enjoyment are denied to the lot-owner. They are equally necessary to its growth and development, to its trade, and the various uses and purposes for which towns and cities are laid out and built. Land-owners, in laying out their lands preparatory to a sale of lots, withhold from sale certain parts at convenient intervals, and set them apart as streets and highways, to be kept open for the public through all coming time, as inducements to the purchaser of lots; and the seller derives his compensation from the enhanced value and market price thereby imparted to the lots proper. Although there are no words of grant as to this appendant privilege, the sale of the lots, with the proclaimed attingent streets, is a complete dedication to the use of the lot-holder and the public as highways; as much so as if a deed were executed conveying the easement, or as if they had been condemned to public use under the power of

eminent domain. The dedication is not restricted to the use of the street in its natural state, but is a surrender of its use to the public as a thoroughfare.—safe and convenient way for travel and transportation, extending the entire width including the sidewalks. As a rule, change of surface is essential to the proper enjoyment of this privilege, and dedication carries with it this right of change. Though the land-owner retains the ultimate fee, his right of property is subservient to the use and enjoyment of the easement by the public; and to the reasonable exercise of the authority of the municipal government to prepare and adapt it, and to make necessary improvements to continue its adaptation to the public convenience and safety. Authority to make all needed excavations or embankments or alterations, to render the street safe and convenient, is implied in the dedication which follows the co-terminous soil into whosesoever hands it may pass. The anticipated size of the town or city, its probable commercial importance, and the proximity of the pass-way to public or business centers, are factors which should enter into the computation; for all these must be presumed to have been had in view when the dedication was made.

It is not the intent and operation of the Constitution to infringe the existing rule as to the liability of the city for grading, altering, or improving the streets, farther than is essential to the protection of private property, and the equal distribution of the public burdens. Where land has been dedicated to the public for use as a street, the rule as to the liability of the municipality for subsequent alterations is the same, under the Constitution, as if the land had been condemned under the right of eminent domain. In case of condemnation, the Constitution does not operate to so restrain the power of municipal corporations over the streets, as to subject them on each successive alteration and improvement, to liability for damages, when the same could legally, and should have been assessed on the first taking or injury of the property. A double liability is not intended, and unless all ascertainable damages are, or presumed to be assessed at once, the corporation might be made liable to a double recovery for the same injury. This rule exempts from liability for damages arising from ordinary and reasonable changes and improvements, which may be due to the natural formation of the surface, or to the increasing wants of the public— which injuries were capable of being foreseen and ascertained, could

and ought to have been naturally anticipated, and are presumed to have been considered and included in the original assessment of compensation. Such changes or improvements are the natural and probable consequences of the uses and purposes for which the land was originally taken, and compensation then awarded; or in case of dedication, for which the owner received consideration in the resultant advantages. *Denver v. Bayer*, 2 Am. & Eng. Corp. Cas. 465; *London, etc., Ry. Co. v. Evans*, 16 Beav. 322; *Lawrence v. Gt. No. Ry. Co.*, 16 Q. B. 643.

But the right of the municipal authorities to change the grade of a street, or alter it in other respects, is not unlimited, nor to be exercised capriciously. It is bounded by the nature of the use for which the property was dedicated or condemned, and the necessities of a safe and convenient way, having reference to the wants of the community. To limit construction of its highways, as employed in the Constitution, strictly to its primary signification, would exclude cases which come within its spirit, and defeat the particular intent, that compensation shall be made for every injury to private property for public use in the forms specified; cases which came within the mischief and the constitutional remedy. The dividing line lies between what is necessary to safe and convenient use on the one hand, and what is in excess thereof and not essential thereto, or mere ornamentations on the other. Under this rule the Constitution requires compensation to be made for the extraordinary changes which may not be due to the natural formation of the surface, nor to the mode of original construction, as then deemed sufficient to a safe and convenient way. A material change, operating injury to adjoining premises, occasioned by a contingency which could not have been reasonably and fairly foreseen, or made merely because the corporate authorities may judge that the public convenience would be increased thereby, or the general appearance of the street improved, is a new description of injury in the enlarged sense of the Constitution, which casts on the property owner an additional burden, entitling him to compensation. Injuries by the construction of a highway, as provided for in the Constitution, include those injuries produced by alterations which could not have been naturally and reasonably anticipated, and damages for which could not have been legally awarded in the preliminary assessment if the land is condemned, or if dedicated, which the owner would not be estopped to claim. This construc-

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tion effectuates the cardinal purposes of the Constitution—the protection of private property and the equal distribution of the public burdens—avoids double compensation; and is applicable alike to all corporations, municipal and other, and individuals invested with the privilege of taking private property for public use. We are aware that we have left a wide margin for diversified opinion; but we cannot lay down a more definite general rule applicable to all cases where each case is dependent on its special facts and circumstances; as definite however as the rule which defines the prospective injuries, for which compensation may be recovered on condemnation of the land for public use. It applies when the municipal corporation is not the owner of the fee. If such owner, other rules may govern.

It follows that whether the lowering of the sidewalk to the level of the street is a construction of the highway is a mixed question of law and fact. The court erred in not submitting the ascertainment of the facts to the jury, and in instructing them that the plaintiff is entitled to recover if his property was injured, without regard to the circumstances or the character of the alteration.

If the plaintiff is entitled to compensation, the measure of damages is the difference between the market value of the lot before and after the lowering the sidewalk—the diminution in value produced thereby. The falling of the brick fence, and the apprehended undermining of the house, caused by subsequent rains, are damages caused by the intervention of an independent agency, not put in operation by the act of the defendant, and too remote to be considered elements of damages.

Reversed and remanded.

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(80 Ala. 505.)

Negligence — causing death — contributory negligence of deceased — remote cause.

No action can be maintained by an administrator for the death of his intestate, caused by intoxicating liquor sold him by the defendant.

ACTION for damages. The opinion states the case. The defendant had judgment below.

J. B. Moore and J. T. Kirk, for appellant.

Wm. Cooper and James Jackson, contra.

SOMERVILLE, J. The question raised for our decision, by the ruling of the court below on the demurrer to the complaint, is, whether under the provisions of section 2641 of the present Code, 1876, authorizing an action to be brought for a wrongful act or omission causing the death of another, the personal representative of the deceased person can maintain an action against a retailer of intoxicating liquors, who sells or gives them to a man of known intemperate habits, who is helplessly drunk at the time, the drinking of which causes his death almost instantaneously.

1. The statute, under which the action is brought, provides that "when the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within two years thereafter, if the former could have maintained an action against the latter, for the same act or omission, had it failed to produce death, and may recover such sum as the jury deem just." The remainder of the section, providing how the amount shall be distributed, and for the survival of the action against the personal representative of the wrong-doer, does not affect the question under consideration, and need not therefore be particularly referred to by us. Code, 1876, § 2641.

The selling or giving away of spirituous, vinous or malt liquors, in any quantities whatever, to persons of known intemperate habits, except upon the requisition of a physician for medicinal purposes, is in this State made a misdemeanor, and a license to sell or retail affords no protection to the guilty party. Code, 1876, § 4205.

The foregoing section of our Code (§ 2641), like many similar statutes in other American States, was evidently modelled after what is commonly known in England as Lord Campbell's Act, 9 and 10 Vict., chapter 93, enacted by the British Parliament in the year 1846. The language there used was that "whosoever the death of a person shall be caused by (any) wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every

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such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony."

2. The purpose of this, and like legislation, was clearly to correct a defect of the common law, by a rule of which it was well settled, that a right of action, based on a tort or injury to the person died with the person injured. Under the maxim, "*Actio personalis moritur cum persona*," the personal representative of a deceased person could maintain no action for loss or damage resulting from his death. *Hallenbeck v. Berkshire R. Co.*, 9 Cush. 480; *Quin v. Moore*, 15 N. Y. 436. The reason for the rule was said by Baron PARKE, in a case arising before him under the English statute, to be, that in the eye of the common law "the value of life was so great as to be incapable of being estimated by money." The rule probably however rests on a broader basis.

3. These statutes, it will be observed, each give a right of action only in cases where the deceased himself, if the injury had not resulted in his death, might have sustained a recovery. They continue, in other words, for the benefit of the specific distributees "a right of action which at common law would have terminated at the death, and enlarge its scope to embrace the injury resulting from the death." Cooley Torts, 264.

4. The condition that the action must be one which could have been maintained by the deceased had it failed to produce death, or had not death ensued, has no reference to the nature of the loss or injury sustained, or the person entitled to recover, but to the circumstances attending the injury, and the nature of the wrongful act or omission which is made the basis of the action. *Saunders* Neg. 219; *South & North Ala. R. Co. v. Sullivan*, 59 Ala. 272, 281. As said in *Whitford v. Panama R. Co.*, 23 N. Y. 465, where a similar phrase in the New York statutes was construed, it "is inserted solely for the purpose of defining the kind and degrees of delinquency with which the defendant must be chargeable in order to subject him to the action."

5. It necessarily follows, and has been accordingly decided with great uniformity by the courts, that where the negligence of the person killed has contributed proximately to the fatal injury, no action can be maintained by his personal representative under this

statute because the deceased himself would not have been entitled to recover had the injury not proved fatal. Cooley Torts, 364; Saunders Neg. 215; 1 Anderson Torts (Wood's ed.), p. 621, § 575; *Savannah & Memphis R. Co. v. Shearer*, 58 Ala. 672.

6. We first observe that the cause made by the complaint does not seem to us to fall within the letter or spirit of the statute, and the court below so decided on the demurrer. The death of the deceased was not "caused" so much by the wrongful act of the defendants in selling him whisky, as by his own act of drinking it after being sold to him. The only wrongful act imputed to the defendants was the selling, or giving as the case may be, of intoxicating liquors to the deceased while he was in a stupidly drunken condition, knowing that he was a man of intemperate habits. It is not shown that the defendants used any duress, deception, or arts of persuasion to induce the drinking of the liquor. The act however as we have said, was a statutory misdemeanor. But this was only the remote, not the proximate or intermediate cause of the death of plaintiff's intestate. The rule is fully settled to be that "if an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last or proximate cause, and refuse to trace it to that remote." Cooley Torts, 68, 69; 1 Anderson Torts, 12, 13, §§ 10, 11. The statute under consideration was not intended to annul, but rather to preserve this rule of the common law, so necessary to the certainty and justice of its administration, that there must be some proximate connection between the wrong done and the damage claimed to result from it, that the two must be sufficiently conjoined so as to be "concatenated as cause and effect," as often said. Had it not been for the drinking of the liquor, after the sale, which was a secondary or intervening cause co-operating to produce the fatal result, and was the act of deceased, not of defendants, the sale itself would have proved entirely harmless. Hence it cannot be said that the wrongful act of the defendants, in making sale of the liquor, caused the death of King; but rather his own act in drinking it. And this must be true, whatever the condition of his mind or state of intellect, and without regard to the question of any contributory negligence on his part. The case, we repeat, is one not covered by the statute.

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7. The plaintiff is moreover in our opinion debarred from recovery by the contributory negligence of the deceased, even admitting that the wrongful act of the defendants caused the death of King. It is shown that the deceased was helplessly drunk when he purchased and drank the liquor, so much so as to render the exercise of ordinary care by him impracticable, if not impossible. The presumption is that this condition was brought about by his own voluntary or negligent act, by the persuasion or coercion of another. If we admit that the state of mind thus produced was analogous to that of one *non compos*, or insane, so that the deceased was in mental darkness and so unconscious as to be at the moment incapable of knowledge or consent, thus rendering him morally unaccountable, yet the fact confronts us that this condition was the result of his own negligence or wantonness, and without it the accident of his death would not probably have occurred. The deceased, by the exercise of ordinary care, might have escaped making himself helplessly drunk. By not doing so he was the author of his own death, in view of the fact that it does not appear that the defendants, after the fatal draught was taken, could by the exercise of ordinary care, or even by any practical means at hand, have avoided the consequences of death which almost instantly followed. This involved every element of contributory negligence, and was sufficient to prevent a recovery by the deceased, had death not ensued. *Railroad Accident Law* (Patterson), 74; *Illinois Cent. R. Co. v. Crugen*, 71 Ill. 177; *Cramer v. Burlington*, 42 Iowa, 315; *Whart. Neg.*, § 332.

8. We have thus hypothetically admitted the contention of appellant's counsel that one drunk to unconsciousness is to be placed upon the same ground as infants of tender years, persons *non compos*, or insane, so far as concerns the question of plaintiff's contributory negligence. The contrary of this however would seem to be true, as the basis of the rule governing the latter classes is that of moral accountability. Imbeciles, lunatics and infants are not accountable morally for the state of their minds, and yet the law governing the subject of contributory negligence, even as applicable to them, is admitted to be in a very unsatisfactory and doubtful state. *Cooley Torts*, 680, 682. A drunkard, or one in a state of voluntary intoxication, can scarcely claim so much charity from the law in this particular as imbeciles and lunatics, because he has by his own agency, either wantonly or negligently, brought

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about his own misfortune. As drunkenness is no excuse for crimes, or for torts, no more should it be a basis for the liability of another in an action brought against him by the victim of such inebriety.

9. The case of *McCue v. Klien*, 60 Tex. 168; s. c., 48 Am. Rep. 260, referred to by appellant's counsel as an authority to support the present action, although analogous to it in some respects, is broadly distinguishable from it in one important particular. There the death of the deceased was brought about by the defendants' conspiring together to induce and persuade the deceased to swallow a large amount of whisky, he being already so drunk as to be deprived of his reason and to be rendered incapable of resistance, the draught being thus imposed upon him in his helpless condition. The case was made to rest on the ground that the administration of the deadly draught, like that of a noxious drug, was an assault, the deception by which it was accomplished being a fraud on the party's will, equivalent to force in overpowering it. *Com. v. Stratton*, 114 Mass. 303; s. c., 19 Am. Rep. 330.

The demurrer to the complaint was, for the foregoing reason, properly sustained, and the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

SCHUESSLER v. DUDLEY.

(30 Ala. 547.)

Homestead — tax collector's — liability on his bond.

The homestead of a tax-collector is subject to the lien of his official bond, in the hands of a purchaser with notice before judgment. (*See note, page 123.*)

BILL to enforce lien on land. The opinion states the case. Dismissed below.

Bragg & Thorington, for appellant.

J. M. Falkner, Wm. A. Collier, J. S. Edwards and Watts & Son, contra.

SOMERVILLE, J. The defendant, Dudley, was tax-collector of Chilton county, and in October of the year 1875 executed his

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official bond in such capacity, and in the form prescribed by statute, with Moses Simmons, the complainant's intestate and others as sureties. In the years 1876 and 1877, Dudley, having collected a large amount of tax-money due the county, failed to pay over such funds to the county treasurer, within the time fixed by law, and thereby became a defaulter to the county on May 1, 1877. A summary motion was instituted in the Circuit Court against Dudley and his sureties, in the name of Chilton county, and judgment was rendered against them in the following year, 1878, for the amount of such defalcation, with interest, damages, and costs — being about the sum of \$1,400. This proceeding was taken under section 3396 of the present Code.

Simmons, a surety, paid this judgment, and it was assigned to him by the plaintiff in the judgment, Chilton county, pursuant to the requirement of section 3418 of the Code of 1876, which expressly preserves the full vitality of such judgments as against the principal debtor, in favor of the surety paying or satisfying them, under certain qualifications not affecting this case.

The present bill was filed by Simmons, the suit being afterward revived in the name of his administrator, and its purpose is to enforce the lien created by statute in favor of the original plaintiff, for the benefit of the complainant, as a surety, against the tax-collector, the co-sureties on his bond, and certain alienees, of property fraudulently conveyed by such collector after the execution of his bond. It is provided by statute — and such was the law in force at the time of the giving of defendant Dudley's bond — that "the bond of the tax-collector shall operate, from its execution, as a lien in favor of the State and county on the property of such tax-collector for the amount of any judgment which may be rendered against him in his official capacity for the State or county taxes, and on the property of his sureties from the date of his default." Code, 1876, § 403.

[Minor point omitted.]

There is another question however presented by the record. Two of the defendants, Mrs. Callens and Mrs. Baker, are shown to be purchasers of lots which constituted a portion of the homestead of their co-defendant, Dudley, which was owned and occupied by him as such, at the time of the execution of his bond as tax-collector in October, 1875. It is not denied that they are chargeable with notice of the lien on the land, if by law it was fastened on the home-

stead. The question then is, whether the homestead of the principal debtor, the tax-collector, was subject to condemnation to satisfy this demand. Did the execution of the bond, under the influence of the statute, operate to fix the lien on property which is exempt from sale for ordinary debts, under the Constitution and laws of this State?

The rights of the complainants in this particular, as we have shown, are precisely commensurate with those of the original plaintiff in the judgment, the county of Chilton. As assignee of the county, he is empowered to "assert, in law or equity, any lien or right against the principal debtor, which the plaintiff could assert, if the debt had not been paid." *Vanderveer v. Ware*, 65 Ala. 606; Code, 1876, § 3418. This language of the statute is very broad and explicit, and can admit of but one interpretation. It puts the complainant in the shoes of the county of Chilton, and permits no defense against him which could not have been successfully urged against the original plaintiff, had there been no assignment to, or payment by the surety.

It is our opinion that the homestead exemption law is not operative against the present liability. The Constitution and statutes apply only to sales on execution, or other process from the courts "for any debt contracted." It has no application to judgments based on torts, liabilities in the nature of torts. Const. 1875, art. 10, § 2; Code, 1876, § 2820. The past decisions of this court commit us fully to this construction. In *Meredith v. Holmes*, 68 Ala. 190, it was decided that a defendant's homestead was not exempt from levy and sale under execution on a judgment based on a recovery of damages in an action of trespass. In *Williams v. Bowden*, 69 Ala. 433, a like ruling was made as against a judgment recovered for a penalty given by statute against a mortgagee for failure to enter satisfaction of a mortgage, after its payment, pursuant to the requirement of section 2223 of the Code of 1876. And in *Vincent v. State*, a claim of exemption was disallowed on a bill being filed by the State against a defaulting public officer, for the recovery of money belonging to the State, which he had converted to his own use. This ruling was based, not on any alleged prerogative of the State, but upon the broader ground, that the conversion of the money was both a tort and a crime, and no exemption of property could be claimed or allowed against such a liability.

In *Whiteacre v. Rector*, 29 Gratt. 714; s. c., 26 Am. Rep. 420, the Virginia Court of Appeals, under a constitutional provision precisely like our own, decided that a homestead exemption could not be claimed as against a fine due the State for a violation of its criminal laws. While this court, in *State v. Allen*, 71 Ala. 543, admitted *arguendo*, the probable correctness of this view as against the principal debtor, who was convicted and fined, its application to the sureties was denied on the ground that the confessed judgment for the fine was purely contractual as to them, a mere promise to pay money.

In *Kirkpatrick v. White*, 29 Penn. St. 176, a constable, against whom an execution was issued upon a judgment, obtained for negligence in failing to return an execution in another cause, was held not to be entitled to the benefit of the exemption laws.

There are many other decisions in various States analogous to the foregoing. Thompson Homestead, §§ 380, 383.

The present liability, so far as the principal debtor is concerned, is in the nature of one *ex delicto*. It is not a mere suit on the tax-collector's bond, but a summary action for money presumptively converted, with interest, a penalty of ten per cent damages, and costs added. It is a judgment for an official defalcation, not for "a debt contracted," within the meaning of the Constitution, or the statutes, as much so as either an ordinary penalty, or a fine, for either of which an action of debt in mere form would lie.

The objection, that this result can only be reached by working out contribution among joint wrong-doers, is without force. The tax-collector, who is the defaulter, is here the only wrong-doer. While he has been guilty of an offense against the public revenue, which is made by statute either a misdemeanor or felony, according to the circumstances of the case, the sureties on his bond are chargeable with no such criminal dereliction. *Britton v. State*, 77 Ala. 202; Code, 1876, p. 414, §§ 4265, 4266. They have contracted with the county, and with each other, to make good this default, and out of these contractual relations, grows the jurisdiction of equity in this case. But the rights of the complainant in the matter of exemptions grow more particularly out of the statute and the assignment to his intestate of the judgment recovered by the county of Chilton. Against this, as we have shown, there was no homestead exemption which could be lawfully claimed.

These views necessarily lead to a reversal of the decree of the chancellor, which is accordingly adjudged, and the cause is remanded, that further proceedings may be had in accordance with the principles announced in this opinion.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—CLOPTON, J., dissenting, said, among other things: "In construing Constitutions, the form or manner of expression should not be regarded, so much as the nature and purposes of the provisions, the evil to be remedied and the benefit to be secured—the end to be accomplished. *Carroll v. State*, 58 Ala. 396. A State Constitution should be interpreted in the light of the common law when pertinent, and of its predecessors if any. Exemptions of property from the payment of debts, which in the absence of statutory or constitutional provisions would have been subject, has been the policy of the State from its earliest organization; and from time to time statutes have been enacted enlarging the kind and *quantum* of the property exempted. Provisions were incorporated for the first time in the organic law, expressly declaring exemptions in the Constitution of 1868. These statutory and constitutional exemptions are founded in a humane and benevolent policy, looking to the promotion of the public weal, by protecting the wife and children against the improvidence of the husband and father, and securing to the family a home, a shelter from misfortune and adversity; and in furtherance of this beneficent policy, in which they originated and have been perpetuated, they have always received a liberal construction.

"The security and protection of the homestead seem to have been an object of special care, and a special end to be accomplished. Though personal property is also exempted, the owner retains unrestricted power to transfer, or to create liens thereon; whilst as to the alienation of the homestead, preventive power is conferred on the wife—no mortgage or other alienation shall be valid without her voluntary signature and consent, whatever may be its form. A mere contract to alienate, though operating if it were valid as a conveyance of an equitable title, and having the voluntary signature and assent of the wife, does not give a right to insist upon a conveyance of the legal estate. The courts cannot compel the wife's performance. *Jenkins v. Harrison*, 66 Ala. 345; *Phillips v. Stauch*, 20 Mich. 369. It will scarcely be controverted, that an equitable mortgage comes within the letter and spirit of the constitutional provision, and that no lien attaches to the homestead under such mortgage, which the courts will enforce, certainly without the signature and assent of the wife. The lien on the property of the tax-collector, which the statute declares shall be created by the execution of his official bond, is founded in contract, as much as that of a mortgage would be, and on this ground are based the right of subrogation, and the power of the court to enforce the lien. In *Knighon v. Curry*, *supra*, it is said: 'The statute subjecting the property of a tax-collector to a lien for any default he may commit, the lien attaching on the execution of his official bond, is of the same dignity it would be if in express words it was written as a stipulation of the bond. If so written, the

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bond would only repeat and declare its legal effect and operation. And if so written, in the absence of the statute, it would operate as an equitable mortgage, and as such a court of equity would enforce it.' *County of Dallas v. Timberlake*, 54 Ala. 408. A lien thus created and of such nature can have no more force or operation to deprive the owner of the homestead, than an equitable mortgage would have, or than if the lien, independent of the statute, were expressly stipulated in the bond. In Illinois, the statute provided that the homestead shall be exempt from levy and forced sale for debts contracted after a stated time; 'and no release or waiver of such exemption shall be valid unless the same shall be in writing, subscribed by such householder, and acknowledged in the same manner as conveyances of real estate are by law required to be acknowledged.' The bond of the tax-collector was also declared by statute to be a lien on all his real estate within the county, at the time of filing thereof. Under these statutes, it was held that the lien cannot be enforced as against the homestead; that 'the homestead right is protected against all liens and sales, and against all modes of conveyance, whether by deed absolute or mortgage, unless it shall be released or disposed of in the mode prescribed by the act. *Hume v. Gossett*, 43 Ill. 297. The Constitution does not secure the homestead as a personal privilege of the debtor, but as an absolute right, essential to the well being of the household, of which he cannot be deprived, except by alienation with the voluntary assent of the wife, accompanied by her signature. By express provision, the exemption does not extend to a mortgage lawfully obtained, and executed in the mode prescribed. The section being general, conferring an immunity, and expressly excepting a specified lien, indicates the exclusion of all other liens, unless otherwise provided in the Constitution. *Expressum facit cessare tacitum*. Moved by the frequent necessity of a waiver of exemptions, the framers of the Constitution of 1875, while incorporating therein *verbatim* the homestead exemption as declared by the former Constitution, provided another and additional mode of waiving the exemption, but still requiring the signature of the wife. In view of the policy of exemptions, and giving the constitutional provisions a liberal construction, the inference arises that it was intended, the owner being a married man, that the household should not be deprived of the homestead, directly or indirectly, by being subjected to debts contracted by the husband, in any mode other than specifically prescribed, or otherwise authorized by the Constitution. To this end the voluntary signature and assent of the wife in the mode provided is essential. Under the Constitution the Legislature could not declare a lien, to be created by the contract of the husband as security for a pecuniary liability, which the courts can enforce against the homestead, without regard to the signature and assent of the wife. I do not wish to be understood as intimating a doubt of the correctness of the decisions, which hold that a right of exemption cannot be asserted, under the Constitution and the statutes, against a judgment for a tort. No lien arises in such case until judgment and execution thereon. But I do not regard as a logical sequence from this rule, that a lien which does not necessarily depend on the commission of a tort, but is created by the execution and filing of the bond, and rests in contract, should be declared and enforced on a homestead, which the tax-collector has sold and conveyed before

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judgment is rendered against him in his official capacity — a homestead which cannot be sold by virtue of the execution lien, and can be subjected only by enforcing a prior contractual lien. No reference is intended in this opinion to the exemption so far as enlarged by mere statutory provisions, as to which, it may be, different rules should be applied."

TOWN OF GREENSBORO V. EHRENREICH.

(80 Ala. 579.)

Municipal corporation — ordinance — prohibiting dealing in second-hand clothing.

Authority of a municipal corporation to pass ordinances necessary or proper to prevent the introduction of contagious or infectious diseases and to preserve the health of the inhabitants, does not empower it to enact an ordinance making it unlawful to import or sell or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-clothes, excepting the sale of such articles when not imported or which have not been used by persons having infectious diseases.*

CONVICTION of violation of an ordinance. The opinion states the case. The defendant was discharged below.

Coleman & Coleman, for appellant.

Thos. R. Roulhac, contra.

CLOPTON, J. The charter of the town of Greensboro confers authority: "To pass and enforce all ordinances deemed necessary or proper to prevent the introduction of infectious diseases, and to preserve the health of the inhabitants of the same." Under this power, the corporate authorities passed an ordinance declaring: "That it shall be unlawful for any person to import, sell or otherwise deal in cast-off garments, blankets, bedding or bed-clothes in said town of Greensboro; provided, that this ordinance shall not apply to the sale of said articles not imported, and that have not been used by persons having infectious diseases;" and prescribing a penalty for its violation. The validity of the ordinance is the question for determination.

* See *Train v. Boston Disinfecting Co.* (144 Mass. 523), 59 Am. Rep. 113.

The legislature has undoubted power to authorize, and the authority conferred is ample, to pass ordinances on the enumerated subjects—the prevention of the introduction of infectious or contagious diseases, and the preservation of the public health. Ordinances, having for their object the protection of the health of the inhabitants, which is one of the principal purposes and most important duties of municipal governments, are generally regarded as police regulations, subject to which the individual holds his rights of liberty and of property. Presumptions will be indulged in favor of their necessity, propriety and validity, and when not unreasonable nor partial, nor oppressive nor inconsistent with the legislative policy of the State, should and will be sustained. Considered a part of a system of police regulations in aid of the preservation of the public health, the courts will not interfere with or set them aside, unless the power has been manifestly transcended. By the grant of power, the character and special provisions of the ordinances are largely left to the discretion and judgment of the corporate authorities—deemed necessary or proper,—not however an absolute power to pass any ordinances, which they may perchance judge necessary or proper; not to be exercised capriciously but with regard to the circumstances, the object to be accomplished and the existing necessity. Notwithstanding the grant of power is general—“to pass and enforce ordinances deemed necessary and proper”—ordinances passed under the power must not be unreasonable, partial or unfair; must not be in restraint of trade, nor contravene the general laws and public policy. It will not be presumed that the legislature intended to clothe the municipal government with power to dispense with the requisites to a valid ordinance. The power will not be enlarged by intendment. And though the necessity and propriety of a particular ordinance is primarily of legislative determination, its character, whether reasonable, impartial and consistent with the State policy, are questions for the court. 1 Dill. Mun. Corp., §§ 319, 325, 329; *Int. & Coun. of Marion v. Chandler*, 6 Ala. 899; *Ex parte Frank*, 52 Cal. 606; s. c., 28 Am. Rep. 642.

The general statutes provide quarantine as the means to prevent the introduction of infectious or contagious diseases. To this end any town or city may establish a quarantine ground; the corporate authorities may from time to time prescribe the quarantine to be observed by all vessels arriving within the harbor or vicinity; may

extend such regulations to all persons, goods and effects in such vessels; and may compel any person coming into town, by land, from a place infected with a contagious disease to perform quarantine and be restrained from travelling until discharged. Code of 1876, §§ 1507-1512. The policy of the statutory provisions is the regulation of trade and travel by temporary restraint, not extending beyond the occasion and scope of the necessity — self-defensive, which is the limitation on the police power of the State imposed by the Federal Constitution. *Railroad Co. v. Husen*, 95 U. S. 465. The State cannot confer upon the subordinate agencies of the government powers which it does not possess and cannot exercise. The general grant in the act of incorporation, it will be presumed, had reference to these and kindred regulations. We do not mean that the corporate authorities may not adopt and provide other and additional regulations; but that they should be in accordance with the spirit and policy of the general statutes.

The professed object of the ordinance, as shown by the preamble reciting the recommendation of the officers and members of the board of health, is to protect the health of the community. While unquestionably the municipal government may pass sanitary ordinance for the preservation of health within its limits; may prevent articles of merchandise or other things which have been used by persons or in places infected with contagious disease, from being brought into the town; may establish quarantine and reasonable inspection regulations, and provide for disinfecting or destroying the germs of disease as far as practicable, and it may be, for obtaining satisfactory assurance that such articles have not been exposed to an infectious or contagious disease; the power cannot be carried beyond what is necessary for protection. It will not be controverted that second-hand or cast-off garments, blankets, bedding and bed-clothes are not, *per se*, introductive of infectious or contagious diseases, and that a lawful business selling or dealing in them may be carried on without danger to the public health. They become dangerous by reason of the nature of previous use, condition or exposure. This is virtually admitted by the *proviso* to the ordinance, which excepts from its operation the sale of the specified articles not imported, and that have not been used by a person having an infectious disease. The operation of the ordinance reaches beyond the scope of necessary protection and prevention into the domain of restraint of lawful trade by permanently pro-

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hibiting the importation, selling or otherwise dealing in the enumerated articles, though they may not have been used by persons or in districts infected with such diseases. Municipal authorities, having power to abate nuisances, cannot absolutely prohibit a lawful business not necessarily a nuisance, but may abate it when so carried on as to constitute a nuisance. They cannot, under the claim of exercising the police power, substantially prohibit a lawful trade, unless it is so conducted as to be injurious or dangerous to the public health. If they can declare it unlawful to import, sell or otherwise deal in second-hand or cast-off garments, blankets, bedding and bed-clothes, without regard to the circumstances or necessity, they may, under the same power, declare it unlawful to import or sell meat because at some times and in some places it is infected with trichina or other kind of food because liable to adulteration. That the ordinance is founded on the fear and apprehension of possible danger, and not on its existence, is shown by the unequal discrimination between articles imported and not imported. We cannot regard it a legitimate exercise of the power conferred by the act of incorporation. *Weil v. Record*, 24 N. J. Eq. 169; *Barling v. West*, 29 Wis. 307; s. c., 9 Am. Rep. 576; *Dunham v. Rochester*, 5 Cow. 482; *Mayor, etc., of Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441.

Judgment affirmed.

WILLIAMS V. STATE.

(31 Ala. 1.)

Criminal law — conspiracy to assault — homicide by one.

If several persons conspire to invade a man's household, and go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of this common design one of them gets into a difficulty with him, and kills him, the others being present, or near at hand, the latter are guilty of murder although they did not intend to kill.

CONVICTION of murder. The opinion states the case.

A. McLendon and Jere N. Williams, for appellants.

T. N. McClellan, attorney-general, *contra*.

SOMERVILLE, J. The question most pressed on our attention, and the one of controlling influence on the merits of this case, is raised by the first charge given by the court at the instance of the State. This charge asserts, in substance, that if the defendants all entered into a conspiracy to assault and beat, or to kill the deceased, and in pursuance of such common design, one of said defendants did kill deceased by shooting him with a pistol, in his own house, and not in self-defense, the other defendants then being near at hand, all of the defendants would be guilty of murder. Other charges asserting the converse of this were requested by the defendant and refused by the court.

It must be kept in mind that the defendants are not indicted in this case merely for a conspiracy to commit murder, but as principals in the crime of murder itself. Nor is the case complicated by any inquiry as to distinctions between accessories before the fact and principals in crime, or principals in the first and second degree, the statutes of this State having, in cases of felony, abolished the common-law distinction in this particular, by providing that "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid or abet in its commission, though not present," are authorized to be indicted, tried and punished as principals. Code 1876, § 4802; *Hughes v. State*, 75 Ala. 31.

The general rule is familiar, that where several parties conspire or combine together to commit any unlawful act, each is criminally responsible for the acts of his associates or confederates committed in furtherance or in prosecution of the common design for which they combine.

The point of difficulty arises in applying this general principle, when it is sought to ascertain what particular acts come within, or are departures from the common design or plan. It is very clear that one may often be responsible for an act, committed either by himself or by a confederate, which he did not specifically intend to commit. A common example is found in the case, often adjudged, where one, who commits a mere civil trespass by shooting at another's fowls, wantonly or in sport, may be held guilty of manslaughter, when the death of a human being accidentally ensues; and if his intent was to steal the fowls, then of murder, although he did not specifically intend homicide in either case. So the case is put by Mr. East, if one willfully, with intent to hurt, throw a

large stone at another, and by accident kill him, this is murder; but if the stone is small and not likely to produce death, it would seem to be manslaughter. 1 East P. C. 257. It is thus an important rule, as we shall more fully show, that the responsibility for incidental and often for accidental results broadens with the magnitude or heinousness attached to the unlawful act specifically agreed to be perpetrated. This is upon the principle that every one is presumed to intend, and therefore must be held responsible for the natural and probable consequences of his own acts. It necessarily follows where one person combines with another to do an unlawful act, he impliedly consents to the use of such means by his confederate as may be necessary or usual in the successful accomplishment of such an act. The more flagrant and vicious the act agreed to be done, the wider is the latitude of the agency impliedly conferred to execute it.

The rule of criminal responsibility, in cases of conspiracy or combination, seems to be, that each is responsible for every thing done by his confederates which follows incidentally in the execution of the common design, as one of its probable and natural consequences, even though it was not intended as a part of the original design or common plan. 1 Whart. Crim. Law (9th ed.), §§ 214, 220. In other words, the act must be the ordinary and probable effect of the wrongful act specifically agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates, outside of, or foreign to the common design. Nor must it have been committed by one of the confederates after the explosion of the plot, or the abandonment of the common design, or from causes having no connection with the common object of the conspirators. 1 Bish. Crim. Law (7th ed.), §§ 640, 641; 1 Whart. Crim. Law, § 397; *Lamb v. People*, 96 Ill. 73; s. c., 2 Crim. Law Mag. 472; *Ruloff v. People*, 45 N. Y. 213; *Thompson v. State*, 25 Ala. 41; *Frank v. State*, 27 Ala. 37.

The application of the rule to cases of homicide is made in 1 Hale P. C. 441, where it is said: "If divers persons come in one company to do an unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kill a man, this shall be adjudged murder in them all that are present of that party abetting him and consenting to the act or ready to aid him, although they did but look on." And the

following language is used in 1 East P. C. 257: "Where divers persons resolve generally to resist all opposers in the commission of any breach of the peace, and to execute it with violence, or in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseizin with great numbers, or going to beat a man, or rob a park, or standing in opposition to the sheriff's posse, they must at their peril abide the result of their actions."

It has long been a rule of law, now often repeated by the text-writers, that "if A. command B. to beat C., so as to inflict grievous bodily harm, and he beat C. so that C. dies, A. is an accessory to the murder, if the offense be murder in B." 1 Whart. Crim. Law, § 225; 1 Hale, 617. The line of distinction here is narrow, as appears from the proposition announced by Mr. Bishop, in support of which there are many adjudged cases. "If," he says, "two combine to fight a third with fists, and death accidentally results from a blow inflicted by one, the other also is responsible for the homicide. But if one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable." 1 Bish. Crim. Law (7th ed.), 637; *Reg. v. Caton*, 12 Cox Crim. Cas. 624; s. c., 10 Eng. Rep. (Moak) 506. The implied agreement here is evidently not to resort to the use of a deadly weapon, and the use of such weapon is therefore foreign to the contemplation of the parties, and a departure from the common design. It is said by some of the standard authors that if the specific act agreed to be done was *malum in se*, the responsibility for unintended results would embrace acts arising from misfortune or chance, but otherwise if such specific act was *malum prohibitum* merely, or lawful. 1 Bish. Crim. Law (7th ed.), § 331; Archb. New Crim. Proc. 9. In some cases the distinction is taken that where persons unlawfully conspire to commit a trespass only, to make all the confederates guilty of murder, the death must ensue in the prosecution of the design. If the unlawful act be a felony, or be more than a trespass, it will be murder in all, "although the death happened collaterally, or beside the original design." *State v. Shelledy*, 8 Clarke (Iowa), 578. In another recent case the rule was announced that "if the unlawful act agreed to be done is dangerous, or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence, which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of

the common design, whether he is present or not." *Lamb v. People, supra.*

The question in this case then would seem to be whether, if five or six men combine together to invade a man's household, and they go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of this common design, all of the confederates being present, or near at hand, one of them gets into a difficulty with their common adversary and kills him, all may not be guilty of murder, although they did not all entertain a purpose to kill? The question, we think, must be answered in the affirmative, in the light of both principle and authority. Every man has the right to defend his house against every unlawful invasion, and to defend his person, when within it, against every and all violence without the necessity of retreat. The experience of mankind shows that very few men will fail to respond to instinct by exercising this right, to the extent even of killing an assailant if necessary. When a mob, conspiring together unlawfully, go to a man's house to do any serious violence to his person, especially in the night-time as here, they can expect nothing else than to meet with armed opposition, and the inference is not unreasonable that they intend nothing less than to oppose force to force, in the furtherance of their design. The natural and probable consequence of this is homicide — either of one or more of the assailants or of the party thus assailed, and such homicide, when committed by any one of the conspirators, can be nothing less than murder in all who combine to commit the unlawful act of violence, especially if they be near at hand inciting, procuring, or encouraging the furtherance of the act of assault and battery.

The adjudged cases sustain this view, some of which we proceed to cite.

In *Peden v. State*, 61 Miss. 268, the precise question was presented and decided. There several persons conspired together to take one Walker from his house and whip him. He was accordingly taken from his bed and severely beaten, and in executing this design one of the confederates struck him a fatal blow with a spade from which he died. It was held that all were guilty of murder, whether they entertained a purpose to kill Walker or not.

In *Brennan v. People*, 15 Ill. 512, where a large number of defendants were indicted for the murder of one Story, instructions were asked which required the jury to acquit the prisoners unless

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they actually participated in the killing of deceased, or unless the killing happened in pursuance of a common design, on the part of the prisoners and those doing the act, to take his life. The court said: "Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combine with those committing the deed to do an unlawful act, such as to beat or rob Story; and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide."

In *Shelley's* case, 8 Clarke (Iowa), 478, the defendants had taken one Wilkinson, and after tying him with a rope, put him in a carriage, started with him to the woods, making menaces of violence against him, by which he was induced to jump from the vehicle into a river, and was drowned, no effort being made to rescue him. It was held that all the confederates might be properly convicted of murder, although some of them designed only to commit personal violence on the deceased, without intending to kill him.

In *Miller v. State*, 25 Wis. 384, the wife of the defendant, without fear or compulsion from him, agreed with him to go to the store of one Wright, the deceased, and to rob it, the husband telling her, and she believing, that he did not intend to kill Wright, but only to knock him down so as to stun him, in order to consummate the robbery. They went together, and the husband in carrying out the plan gave the deceased a fatal blow, the wife giving no intentional assistance. A charge was sustained which justified the jury under this state of facts, in finding her guilty of murder.

In *Miller v. State*, 15 Tex. Ct. Ap. 125, the evidence tended to show that the defendant and two others by the name of Harden acted together in provoking a contest with deceased, one Linson, either with the purpose of killing him, or of doing him some serious bodily harm, and in pursuance of this common design one of the Hardens, in the presence of the defendant, shot and killed deceased. It was held that if the jury believed the evidence, they could lawfully find the defendant guilty as a principal in the act of murder.

In *Ferguson v. State*, 32 Ga. 658, the defendant was convicted of robbery. The facts were, that having effected escape from his own cell in a jail, the defendant had broken the locks off the doors

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of other cells, the inmates of which, as soon as the jailer made his appearance, set upon, bound and blindfolded him, and then some of them proceeded to rob him. The trial court refused to charge the jury that the prisoner could not be convicted of robbery if he was unaware of the intent to rob, but that it was sufficient if the prisoner conspired with the others to effect an escape, and that the robbery charged was in furtherance of this design, the prisoner being near enough at hand to render assistance to those actually committing the felony.

Under the foregoing authorities we are of opinion that the rulings of the court, on this particular branch of the law, were free from all error.

The case of *State v. Absence*, 4 Port. 397, is not in conflict with this view. There the defendant had participated in an assault and battery committed in a personal encounter between one Weaver and one Mosely, only so far as to push the former toward the latter for the purpose of causing a fight between them. A fight ensued, in the progress of which Mosely committed mayhem on the person of Weaver by biting off his right ear, which was a felony. A charge was held erroneous that under this state of facts Absence would necessarily be guilty of mayhem without participation in the felonious intent of Mosely. It was however left an open question in that case, whether if two or more persons should agree together to do some great bodily harm to another, and one of them committed mayhem on the party beaten, all who are present would not be guilty of the mayhem. It may be remarked that Mr. Bishop criticises this case as doubtful, and Mr. Wharton thinks it erroneous. 1 Bish. Cr. Law (7th. ed.), § 635; 1 Whart. Cr. Law (9th ed.), § 214, note 1.

[Omitting minor points.]

Judgment affirmed.

LEGRAND V. EUFAULA NATIONAL BANK.

(51 Ala. 121.)

Sale — fraud — rescission — bona fide purchaser — partnership by married woman — estoppel.

To authorize the vendor of goods to disaffirm the sale, and to recover against the purchaser with notice, the concurrence of three facts must be shown, 1st, the purchaser must have been at the time of the sale insolvent, or in failing circumstances; 2d, he must have had at the time a preconceived intention not to pay for the goods, or no reasonable expectation of being able to do so; and 3d, there must have been, on his part, an intentional concealment of these facts, or a fraudulent representation in reference to them.

Although the original sale was voidable for fraud, at the election of the vendor, he cannot recover against a sub-purchaser for value who had no notice of that fraud.

When a married woman carries on business under the assumed name of a partnership, as "S. & Co.," she may be sued in the partnership name, and cannot plead her coverture in defense of the action, as against creditors who have dealt with her on the faith of it.*

TROVER. The opinion states the points. The defendant had judgment below.

Roquemore, White & Long, for appellants.

A. H. Merrill & G. L. Comer, contra.

SOMERVILLE, J. Under the rule adopted in this State, three facts must concur in order to justify a vendor of goods in disaffirming a sale of them as fraudulent, so as to authorize a recovery in detinue or trover against the first purchaser, or any sub-purchaser, having notice of the fraud.

1. The first purchaser must have been, at the time of the sale insolvent, or in failing circumstances.

2. He must at the time have had either a preconceived design not to pay for the goods, or else, what is deemed equivalent, no reasonable expectation of being able to pay for them.

3. There must have been on the part of the purchaser, either a fraudulent concealment of, or a fraudulent representation in reference to one or more of these facts. And within the meaning of

* See *Noel v. Kinney*, post, 423; *Rogers v. Un. Cent. Ins. Co.*, post.

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the latter rule, an intentional concealment of, or failure to disclose one's financial *status* would be *per se* fraudulent.

The existence of one of these conditions or facts without the others will not be sufficient. The three must be combined. *Kyle v. Ward*, present term; *Loep v. Flash*, 65 Ala. 526; *Spira v. Hornthall*, 77 Ala. 137; *Hornthall v. Schonfield*, 79 Ala. 107; *McCormick v. Joseph*, 77 Ala. 236; *Talcott v. Henderson*, 27 Am. Rep. 501, note, 504-505; *Durell v. Haley*, 19 Am. Rep. 444, note, 446.

There are many authorities which hold to the doctrine that where one buys goods not intending to pay for them, this fact alone will authorize the vendor to disaffirm the sale for fraud, and recover the goods, the rights of no innocent third person intervening. *Belding v. Frankland*, 8 Lea, 67; s. c., 41 Am. Rep. 630, note, 633; 1 Benj. Sales (Corbin), § 656, note 18. But this rule has been discarded in Alabama. So the mere fact that the purchaser was insolvent at the time of the transaction, and concealed or failed to disclose this fact to his vendor, while evidence of fraud, is clearly insufficient alone to vitiate the sale. *Talcott v. Henderson*, 27 Am. Rep. 501, *supra*; *Belding v. Frankland*, 41 Am. Rep. 630, 632; *Nichols v. Pinner*, 18 N. Y. 295; *Wright v. Brown*, 67 N. Y. 4; 1 Benj. Sales (Corbin), § 656, note, 18.

Under this view of the law the court correctly refused the eleventh and twelfth charges requested by the appellants.

2. There was no error in refusing the first charge requested by the plaintiffs. It was erroneous in basing the right of the plaintiffs to disaffirm the sale of the goods alone on the invalidity of the sale by them to Stow & Co., the original vendees. Even though this transaction was voidable for fraud, the defendants acquired a good title if they in good faith purchased the goods for value without notice of the fraud in the first sale.

3. It can scarcely be contended that the release and discharge of a debt due to Stow & Co. would not amount to a valuable consideration on the ground that Stow & Co. was a reputed partnership consisting alone of Mrs. Stow, who was a married woman. A partnership of this kind can be sued as such under the statute, and the coverture as its members is no defense to the action, the execution on such a judgment running against the partnership and being leviable only on its property. It does not issue against the individual members, being in the nature of the proceeding *in rem* rather than *in personam*. *Yarbrough v. Bush*, 69 Ala. 170; Code

1876, § 2904. Nor could Mrs. Stow be permitted to deny the existence of such partnership where its name had been assumed publicly, and credit obtained from the plaintiffs on the faith of its alleged existence. This would be precluded by the principal of estoppel, the chief purpose of which is "the promotion of common honesty and the prevention of fraud." *Calhwell v. Smith*, 77 Ala. 157.

[Omitting minor matter.]

Judgment affirmed.

SULLIVAN V. CONWAY.

(81 Ala. 158.)

Estoppel—by oral admission.

Where plaintiff sues for timber cut and carried away by defendant, an oral admission by defendant that the timber was cut from plaintiff's land, whereby plaintiff was induced to bring the action, does not estop defendant from denying the truth of the matter admitted.

THE opinion states the facts.

James M. Davidson and Stallworth & Burnett, for appellants.

Farnham & Rabb, contra.

STONE, C. J. The plaintiff bases his right of recovery in this suit on the following asserted facts: That plaintiff's intestate was the owner and in possession of section 19, township 2, range 7; that certain trees had been felled on said land without authority of the owner, had been converted into hewn timber, and that the timber so hewn was in the possession of and claimed by defendant when this suit was brought. The testimony which raises the single question presented by this record was given by Sowell, plaintiff's agent, and Conway, the defendant. They differed very materially in their statements as to the particular land from which the timber had been cut, Sowell testifying that Conway admitted to him that "he had gotten the timber cut and taken from the said land, to-wit: Section 19, T. 2, R. 7, and that if it was Sullivan's (intestate) land he was willing to pay for the timber." He further testified that he thereupon instituted this suit for the recovery of said hewn timber.

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Conway denied making the admission that the timber was cut from section 19, and testified it was cut from section 30, which adjoins section 19 on the south. So that the contested issue on which plaintiff's right of recovery depended, so far as this record informs us, was whether the timber was cut from section 19. Unless it was shown to have been so cut, plaintiff showed no right of recovery. On this state of the proof plaintiff asked that the following written instruction be given to the jury: "If the jury believe from the evidence that the defendant told plaintiff's agent, Sowell, that he cut the timber sued for from the land in question, and thereby induced the bringing of this suit, he is estopped from denying on this trial that the timber was cut from said land." This charge was refused and its refusal presents the sole question in this cause.

If there is an estoppel in this case it is what is known in the law as estoppel *in pais*; or perhaps in accurate phrase as applied to this case, "estoppel by misrepresentation and negligence." The general rule in such cases is stated as follows: "Where a man by his words or conduct willfully or by negligence causes another to believe in the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from denying the existence of that state of facts." Rapelje & Lawrence Law Dict.

Estoppels of this class are usually disabling and are invoked to preclude some defense set up. They never create title in the person in whose favor they operate, although when attended or followed by a change of relation of the parties based on them, they sometimes supply sufficient evidence of ownership to maintain an action between the parties themselves. This is the case when one accepts a lease or possession under another and has not been evicted. In such case the estoppel is not the result of the mere verbal admission of the terre-tenant, that the property belongs to the other. It grows out of the changed relation of the parties wrought by a letting on the one side and the acceptance of a lease and possession on the other. This, as between themselves, constitutes them lessor and lessee, with all the rights and liabilities which those terms imply; not that such admission arms the lessor with a title. It simply closes the mouth of the tenant to gainsay his title. *Houston v. Farris*, 71 Ala. 570; s. c., 74 Ala. 162; and there are other kindred cases involving the same principle and governed by the same rule.

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omission to keep a proper lookout and to discover was, not only negligence, but negligence of which the plaintiff's intestate would have a right to complain, if death had not ensued.

It being an undisputed fact that the plaintiff's intestate was walking on the track of the defendant's railroad without right, for his own convenience, the record involves the consideration of the relative and respective rights, duties and liabilities of the defendant operating trains, and of a trespasser on the track. At the place where the deceased was killed, the defendant was entitled to the free, unobstructed and exclusive use of the road-bed for its appropriate purposes. Persons cannot, as matter of right, convert the general track to the uses of ordinary travel or passage. Though the engineer may have actually discovered the deceased when the train arrived at the point of an open view of three hundred yards or more, he would have been authorized to presume, that prompted by the instincts of self-preservation, the deceased would leave the track and place himself beyond the reach of danger in time to escape injury; and would not have been bound to stop or check the train, unless and until the circumstances made apparent that deceased was unaware of its approach, or was unable to extricate himself from the perilous position. *M. & M. R. Co. v. Blakely*, 59 Ala. 471. The duty of lookout is commensurate with the probable occurrence of obstructions and other dangers, and arises as to human beings, not being passengers, when the train is approaching a public crossing, or passing through the streets of a city, town or village. The duty also exists as to live stock, which by their habits and experience furnish reason of apprehension of obstruction, the owner not being regarded as a trespasser. *A. G. S. R. Co. v. Jones*, 71 Ala. 487. But the company may act on the presumption that an intelligent being of discreet years will not assume the risk of trespassing on the right of an unobstructed track; or if he does, that he will use proper and appropriate means to ascertain and avoid any threatening danger. While it is the general duty of a railroad company to keep a proper and vigilant lookout for obstructions and other dangers, including, it may be, trespassers, it is not an absolute and particular duty to an intruder upon the track, so far as to constitute the omission to discover him and to give the cautionary signals negligence *per se*, as to such intruder. *McAllister v. B. & N. W. Ry. Co.*, 19 Am. & Eng. R. Cas. 108; *L. & N. R. Co. v. Greene*, 19 Am. & Eng. R. Cas. 95; *T. H. & I. R. Co. v.*

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Graham, 12 Am. & Eng. R. Cas. 77. We do not wish to be understood from what we have said, as holding that no duty devolves on those in charge of a moving train, when they see a person walking on the track. In such case a due regard for human life, and due precaution against unnecessary injury, require the usual signals of warning to be given. The rules we have stated are intended to apply, and apply only when the person is not discovered.

No neglect of duty on the part of a railroad company in moving trains will excuse a person who steps or walks on the track; from using his senses of sight and hearing, if available. What care would have been required of those in charge of the train, if they were cognizant of the partial deafness of the deceased, it is unnecessary to decide, as it is not shown that it was known to them. In the absence of proof showing that the employees were informed of his deafness, he must be regarded, so far as the duty of the defendant is concerned, as in the full possession of his faculty of hearing. *L. & N. R. Co. v. Cooper*, 6 Am. & Eng. R. Cas. 5. In the direction from which the train was approaching, the track was straight, and the view clear, for a distance of from nine hundred to a thousand feet from the place where the deceased was struck. His eyesight was good. There was a foot path or private way on either side of the railroad, by which a person going to the mill to which he was then going, could easily cross the track. It was the duty of the deceased to have extricated himself from the perilous position, if feasible, by the exercise of ordinary care. If the use of his faculty of sight would have given him sufficient warning to have enabled him to avoid the danger, he cannot complain of any antecedent negligence of the defendant in failing to discover him, or in failing to give the usual signals. The defect of the charges requested by the plaintiff consists in their tendency and legal effect to withdraw from the consideration of the jury the defense of contributory negligence, as to which there could have been no serious controversy on the evidence; and to rest the legal proposition asserted on the doctrine of comparative negligence, which has been discarded by our decisions.

A material qualification of the doctrine of contributory negligence has been established, founded on the universal duty which each member of the community owes to every other member. The duty arises in cases like the present, when those in charge of the moving train become aware, or are in a condition when they ought

to become aware, of the peril of the person, though he may be a trespasser on the track. The nature and extent of the qualification — the degree of care, and the character of the acts or omissions, requisite in such cases, to acquit the defendant of legal responsibility for the injury, constitute the main contention between the parties. The rule, as announced by some of the authorities, is expressed in terms, that the defense of contributory negligence is overcome, if the defendant, by the exercise of reasonable care and prudence, could have averted the injury at the time it was committed; and by others, that the misconduct of the defendant, which produces the injury, must be wanton, or reckless, or intentional. The appellant insists that the rule first stated has been approved by the decisions of this court.

The question has been considered in several cases, and though some of the later decisions may seem to be in conflict, they are reconcilable on reason and principle. The statement of the general principle, as made in *Government Street R. Co. v. Hanlon*, 53 Ala. 70, was modified in *Tanner v. L. & N. R. Co.*, 60 Ala. 621, as follows: "The word 'and' between the words 'wanton' and 'intentional' should be 'or.' Either wanton, reckless, or intentional injury done overcomes the defense of contributory negligence." In the latter case, the deceased was riding on the track in a cut, when the train approached. He endeavored to escape the danger at a crossing near or at the mouth of the cut, when his horse threw him, and it became manifest that he was unable to extricate himself from the peril. It is held that in such case if the person endangered is employing proper care and diligence to escape the danger, to which his previous negligence had exposed him, the failure of those in control of the train to apply proper skill and diligence to avoid the injury, if a proper resort to such skill and diligence might have prevented it, is wanton or reckless negligence, for which the railroad will be held accountable. The effect of the decision is not to disturb or alter the general rule as modified and expressed, but to declare that the want of proper skill and diligence, under such circumstances, is wanton or reckless negligence in the sense of the rule. The emphasized reiteration of the rule in *S. & N. Ala. R. Co. v. Sullivan*, 59 Ala. 272, which was subsequently decided, though reported in an earlier volume, must be considered in reference to the facts of the case, in which the general doctrine was first declared, and as applicable to those facts. The injury in the

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Sullivan case occurred within the corporate limits of Birmingham, where people were constantly passing, and where it was the legal duty of those having control of the train to keep a proper lookout, and to give the usual signals. It was held that the failure, under such circumstances, to keep a proper lookout, and to give proper warning is, *per se*, negligence, and that an action will lie for an injury produced thereby, unless the person injured, after discovering his peril, fails to use proper exertions to extricate himself therefrom; and if he so fail, this would be proximate, contributory negligence, which would deprive him of all right to recover. The question again came for consideration in *Cook v. Cent. R. & B'k'g Co.*, 67 Ala. 533, and arose on a charge requested by defendants, that if the plaintiff's intestate was in fault in being on the track of the railroad, and such fault contributed proximately to his death, the defendants cannot be made liable, unless the conduct of their agents, after observing, or they could with due care, have observed, that he was on the track, was reckless, wanton, or intentional. The case was one where the person injured was making exertions to escape the injury. The deceased, after discovering the condition of peril in which he had put himself, was endeavoring to escape the danger at the time the injury was committed, which was evident to those in charge of the train for a distance of three thousand feet. The charge was held erroneous; and was defective in ignoring this material fact in the hypothesis stated, which the evidence established. The expression of the principle, and the qualification of the rule in *Hanlon's* case, though general, must be construed as referable to the case in hearing and similar cases. In the subsequent case of *Cent. R. & B'k'g Co. v. Letcher*, 69 Ala. 106, alluding to the statute, which requires signals to be given at specified times and places, it was held that the statute does not relieve a person in peril of injury from the duty and necessity of taking ordinary care to avoid it; and does not modify or abrogate the principle, "that a plaintiff shall not recover for unintentional injuries — for injuries not wanton — to which his own negligence directly and immediately contributes." A comparison of the several decisions shows, that they are founded on a distinction in principle between cases in which the negligence of the plaintiff proximately contributed, and cases in which his placing himself in a situation subject to peril remotely contributed to the injury.

Though it will be regarded as contributory negligence, if a person goes on the track of a railroad, or puts himself in a place so near in point of time to a collision with a passing train, as that preventive effort cannot avoid it, his so doing, when danger is not immediate, does not by itself constitute contributory negligence. It is a condition which remotely contributes to the subsequent injury; but it is not, in the legal sense, the proximate cause. Such negligence will not disentitle him to recover, unless he could by ordinary care have avoided the consequences of the defendant's negligence. If the person, though having placed himself in such condition, uses the proper means to discover approaching or threatening danger, and makes proper exertions to avoid it, the liability of the defendant depends on the rule applicable in cases where contributory negligence is not established, and turns on the issue, whether or not the injury could have been prevented by the exercise of reasonable care and prudence. But if a person, having voluntarily and wrongfully placed himself in such condition, thereby assuming its risks, fails to use the proper means to discover the peril, or on discovering it, fails to make exertions to extricate himself, the concurrence of such acts and omissions makes a case of contributory negligence, which operates a constructive estoppel to a recovery, unless it is overcome by the defendant's disregard, not of a particular duty to the plaintiff, but of the general duty not to inflict wanton, or reckless, or intentional injuries on another — the duty to use one's property so as not to injure another. *M. & E. R. Co. v. Thompson*, 77 Ala. 448. The rules are so declared in *Gothard v. A. G. S. R. Co.*, 67 Ala. 114, as applicable to the respective classes of cases herein distinguished.

We are aware that the authorities are not in harmony as to the rule we have enunciated in cases of contributory negligence. Without reviewing them, we are content to adhere to the rule as we understand it to have been affirmed in this State, and which seems to be founded on reason and principle. The other rule introduces the doctrine of comparative negligence, and tends to confuse and mislead. In 2 Wood Ry. Law, § 320, the rule is stated as requiring willful negligence on the part of the railroad company, which is sustained by respectable authorities; but we are unwilling to affirm a rule less strict than that heretofore declared by our decisions.

In order not to be misunderstood, it may be observed that when the persons in charge of the train discover the peril, or are in a

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position when they ought to have discovered it (a position in which the circumstances, movements or condition of the person injured would manifest to a vigilant observer that such person is unaware of his peril, or if aware of it, is unable to extricate himself) a culpable omission to use the means in hand to prevent an accident, when a prompt resort thereto might have prevented it, without endangering the freight or passengers being transported on the train, will be regarded as reckless or intentional negligence. On the other hand, the rule "does not apply, where the manifestation of the peril and the catastrophe are so close in point of time, as to leave no room for preventive effort." If the deceased stepped and walked on the railroad track, without using the precaution to see if a train is approaching, when it is so near that a collision cannot be avoided, his want of due care disentitles the plaintiff to recover. *Tully v. Fitchburg R. Co.*, 134 Mass. 449. An instruction asserting the legal proposition in the terms of the rule, based on a sufficient hypothesis, may be properly given. If the plaintiff apprehends that the generality of the terms may mislead, an explanatory charge may be asked.

On the foregoing principles, charges one, eleven and sixteen, given at the request of defendant, are erroneous, in that they omit from the hypothetical facts, the negligence of the deceased in failing to use means to discover his peril, and to make exertions to avoid its consequences, which is essential to relieve the defendant from liability for other than wanton, or reckless, or intentional misconduct, unless the discovery of the peril and the collision were so nearly simultaneous, that an attempt to prevent it would have been unavailing.

Reversed and remanded.

EUREKA COMPANY V. BASS.

(81 Ala. 200.)

Master and servant — negligence as to machinery — promise to repair — contributory negligence.

If an employee, while engaged in the service, acquires knowledge of any defect in the materials, machinery or instrumentalities used, he may notify the employer of the defect, and continue in the service for a reasonable time, relying on the employer's promise to remedy the defect; yet if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence.

(See note, p. 157.)

Where an employer is a corporation, notice of a defect in the appliances may be given to an agent in charge.

ACTION of damages for negligent killing of plaintiff's intestate. The opinion states the facts sufficiently. The plaintiff had judgment below.

R. H. Pearson and S. F. Rice, for appellant.

R. H. Sterrett and E. K. Campbell, contra.

SOMERVILLE, J. The action is brought for the alleged negligent killing of the plaintiff's intestate, one Moyle, an employee of the defendant, which occurred while the deceased was engaged in superintending the blasting of iron ore in the defendant's mine, and was produced by the explosion of dynamite used in the process of blasting. The accident occurred in December of the year 1884. The preparation for blasting was conducted by drilling a long narrow hole in the iron-ore rock, five or six feet deep, and about one and a half or two inches in diameter. In this cavity was inserted a dynamite cartridge, to which were attached a percussion cap and a fuse.

The negligence specially alleged on defendant's part was in failing to supply a good quality of fuse, after notice of an existing defect, which rendered the further use of this material dangerous to the employees, a fact well known to the deceased. The deceased remained in the service of the defendant five or six days after acquiring knowledge and giving notice of the defect, before he was fatally injured, his death being caused by his entrance into the

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mine about twenty minutes after the lighting of the fuse, under the belief that the fire communicated to it had been extinguished. Good fuse was shown to ordinarily produce an explosion of the dynamite in from two to three minutes under similar circumstances. The main defense relied on is that of contributory negligence on the part of Moyle, the deceased.

The employer or master is bound to use due care and diligence, not only to furnish in the first instance, but to maintain suitable and safe material, machinery and instrumentalities for the work or duty required of his employees, and he is ordinarily liable for any injury resulting from his neglect of this duty. *L. & N. R. Co. v. Allen*, 78 Ala. 494; *Buzzell v. Laconia Mfg Co.*, 48 Me. 113; *Wood-Mast. & Serv.*, § 359. But the law imposes no obligation on the master to take any better care of the servant than the latter may be reasonably expected to take of himself, and every employee, upon entering service, presumptively contracts to assume all the usual and ordinary risks of the employment. 1 Add. Torts (Wood's ed.), § 564, p. 603. "In legal presumption the compensation is adjusted accordingly." *Furwell v. Boston, etc., R. Co.*, 4 Metc. 49. There is no difficulty about these principles, which have been often decided, and with them the rulings of the court below in no wise conflict.

The two points most earnestly pressed upon us are: (1) That the conduct of the deceased, in entering the mine within so short a time as twenty minutes from the moment of setting fire to the fuse, must as matter of law be adjudged by the court to be such negligence as to bar a recovery in this case, such conduct, as is argued, being reckless, and contributing proximately to the death of the deceased; (2) that even if this is not so, the deceased was guilty of contributory negligence by continuing in the defendant's service for an unreasonable length of time after notice given, and the failure of the defendant to repair the defect complained of as existing in the fuse.

The first contention does not strike us favorably. We cannot say, considering only the undisputed testimony of the case, that it is so free from doubt as to admit of no other rational inference, except that of negligence, or that different minds could not reasonably draw opposite conclusions from these facts touching the question of Moyle's negligence in prematurely entering the mine by which he was brought to his death. The inference of negligence

not being clear and certain, the question of its existence was not a question of law, but of fact, and as such was properly left to the determination of the jury. *City Council of Montgomery v. Wright*, 72 Ala. 411; *L. & N. R. Co. v. Allen*, 78 Ala. 494. The demurrer to the several counts of the complaint was for this reason properly overruled; and so likewise, there was no error in refusing the general charge requested by the plaintiff.

The second proposition is one which is not entirely free from doubt, and upon which the authorities are not harmonious. In fact, it does not seem to have been clearly considered, or stated with any great degree of precision in the earlier decisions bearing on the subject of the servant's contributory negligence, resulting in his injury from the continued use of defective appliances in the prosecution of his employment. The question is presented in this case by the refusal of the court to give the charge numbered 18 in the record. This charge substantially asserts the proposition that the deceased, if cognizant of the defect in the fuse, could remain in the defendant company's service only for a reasonable time, after notice of such defect was given to the company, to see if the promise to remedy it, as made by the company, would be performed, and if he remained longer and continued using the defective fuse for an unreasonable length of time, and was killed by reason of such negligence, the plaintiff would be barred of a recovery in the action.

This charge was, in our opinion, a correct enunciation of the law as applicable to the case, and should have been given.

The employee or servant must be charged with the exercise of ordinary prudence. He is not compellable, nor is it prudent for him to remain in the service of his employer, if by doing so he subjects himself to any extraordinary hazard or peril not incident to the usual mode of conducting the business or employment. If he has notice of any defect in the appliances or instrumentalities used by him, from which injury may be reasonably apprehended, he should, generally speaking, quit the service for his own protection. Notice of the defect merely does not however impute to him negligence. He must have notice of the danger, which then becomes a circumstance from which negligence may be inferred, if he continues silently and without objection in the prosecution of his employment. *Wood Mast. & Serv.*, §§ 336, 352, 359.

It is everywhere admitted, that if the danger encountered by the employee through his continuance in the service is so obvious and

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inevitable as that no person of ordinary prudence—that no one but a reckless man—would venture upon it, under the circumstances of the particular case, then the continuance of the peril is at his own risk, and the employer is acquitted of responsibility, upon the ground of the employee's contributory negligence. *Patterson v. Pittsburg, etc., R. Co.*, 76 Penn. St. 389; s. c., 18 Am. Rep. 412; *Snow v. Housatonic R. Co.*, 8 Allen, 441; s. c., 85 Am. Dec. 720.

Where however the employee or servant, electing not to abandon his employment, gives notice to the employer of such defect in the appliances or instrumentalities used by him, and the employer promises to remedy the defect, the relationship of the contracting parties at once undergoes a change. The assurances of the employer that the danger shall be removed is an agreement by him that he will assume the risk incident to the danger for a reasonable time. It obviates the objection that the continuance of the servant in the service was an implied engagement by him to assume such risks, pursuant to the original presumption upon his entering the service. *Hough v. R. Co.*, 100 U. S. 213; Cooley Torts, 559. We have said that the carrying of the risk by the employer will be implied to continue only for a reasonable time after the making of the promise by him to remove the danger producing it. The injury, in other words, must have occurred within the time at which the defects were promised to be removed. If the employee continues to expose himself to the danger by remaining in the service longer than this, he does so in face of the fact that the promise of the employer is violated, and that he has no reasonable expectation of its fulfillment. He can no longer therefore rely upon the promise, and must know that his continuance in service under such circumstances is equally as hazardous and hopeless of remedy as if no assurance or promise had ever been made. A promise already broken can afford no reasonable guaranty of the fulfillment of any expectation based on its disappointed assurances. For a servant or employee to persist in exposing himself to danger on the faith of such a promise may often be a want of that ordinary prudence which the law exacts of him at every stage of his employment, according to the degree and nature of the danger. His continuance in the service for an unreasonable length of time after such promise is a waiver of the defects agreed to be remedied by his employer. The risk therefore again becomes his own, and his conduct, as we have said, al-

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though not necessarily, or *per se* negligent, may or may not become negligent according to the circumstances of the particular case. *Greene v. Minn. & St. Louis R. Co.*, 31 Minn. 248; s. c., 47 Am. Rep. 785; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; s. c., 47 Am. Rep. 525; *Manufacturing Co. v. Morrissey*, 40 Ohio St. 148; s. c., 48 Am. Rep. 669; *Woodward Iron Co. v. Jones*, 80 Ala. 123; *Shear. & Redf. Neg.*, § 96; *Beach Contr. Neg.*, § 140; 2 *Thomp. Neg.* 1009, 1010; *Patterson v. Pittsburg, etc., R. Co.*, 76 Penn. St. 389; s. c., 18 Am. Rep. 412; *Laning v. N. Y. Cent. R. Co.*, 49 N. Y. 521; s. c., 10 Am. Rep. 417; *Saunders Neg.* 127; *Holmes v. Clarke*, 6 Hurl. & N. 349; 30 L. J. Ex. 135; *Wood Mast. & Serv.*, § 361.

The duty of the defendant to furnish and maintain suitable material and appliances for the prosecution of its business is one of that class of duties which the law exacts of it as master or principal without regard to the rank or grade of the agent delegated to perform such duty. When the principal or employer, as here, is a corporation, this is a corporate duty, and its failure to perform it is corporate negligence. As to such acts the agent is the *alter ego* of the principal — the servant occupying the place of the master as much as if the latter were present in person, acting or failing to act for himself. Cases of this sort do not fall within the rule that the master is not responsible for the negligence of one fellow servant resulting in injury to a co-employee in the same common business. The same rule of *respondeat superior* applies where agents are authorized to employ fit servants for the master, or the general management of the master's business is committed to one fully authorized to conduct it. *Tyson v. S. & N. R. Co.*, 61 Ala. 554; s. c., 32 Am. Rep. 8; *Flike v. Boston, etc., R. Co.*, 53 N. Y. 549; s. c., 13 Am. Rep. 545; *Corcoran v. Holbrook*, 59 N. Y. 517; s. c., 17 Am. Rep. 369; *Walker v. Bolling*, 22 Ala. 294; *Wood Mast. & Serv.*, §§ 390, 436, 454; *Cooley Torts*, 560, 562; *Wilson v. Willimantic Linen Co.*, 50 Conn. 433; s. c., 47 Am. Rep. 653.

Stephens being the general superintendent of the defendant's business, charged with the duty of supplying fuse for blasting, and Falls having authority also to make such purchases when needed, notice of the defect given to either of these agents was notice to the company itself. The court so held in all its rulings.

We have examined the other rulings of the court as shown in the general charge, and in the giving and refusing of the charges requested, and find no error in them.

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The rulings on the evidence seem to be equally free from error. We note only such as appear to be least free from doubt.

The question propounded to the witnesses, Gray and Johnson, as to whether the holes were "properly charged" before ignition of the fuse, was free from objection. It called rather for the statement of a collective fact than for a mere opinion. The witness had already stated the customary mode of charging such holes, and the facts and conditions which constituted the preparation prior to the explosion of the dynamite, and the answer called for was a mere affirmation or denial of these facts or conditions as existing in this particular case.

The several questions however were objectionable and properly excluded, which were propounded by the defendant to various witnesses, asking "within what time it would be reasonably safe" to return to a hole charged with dynamite cartridges, after ignition and failure to explode? What was "the rule on this subject among experienced miners in like cases?" and others of an analogous character. The effect of these questions, if allowed, would have been to take from the jury the question of negligence, and try it by the opinions of witnesses and the conduct of others, whose prudence was entirely unknown.

The other exceptions based on the admission and exclusion of evidence are not well taken. *Reversed and remanded.*

NOTE BY THE REPORTER.—Beach says (Cont. Neg., § 140): "But if when the master is notified of the defect in the machinery, or of the incompetence of the servant, he promises to remedy it within a reasonable time, the servant will not be presumed to have consented to it, or to have waived his rights by remaining for such reasonable time in the service."

Thompson says (Neg. 1009): "What will constitute such a reasonable length of time will depend upon the circumstances of each case, and will be a question of fact for the jury. But if, after the expiration of such reasonable length of time, the servant sees that the defect complained of has not been remedied, and he nevertheless continues in the service, he is deemed to accept the risks of the danger, and the master's liability ceases."

In *Crutchfield v. R. & D. R. Co.*, 78 N. C. 300, the court said: "He assumes the risks attendant upon the use of the machinery, unless he has notified the employer of the defects, so that they may be remedied in a reasonable time. But if he sees that the defects have not been remedied, yet continues to expose himself to the danger, the employer's liability ceases." To the same effect, *Belair v. C. & N. W. R. Co.*, 40 Iowa, 662.

Shearman and Redfield (Neg., § 96) lay down the like doctrine, observing: "There can be no doubt that where a master has expressly promised to repair

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a defect, the servant can recover for an injury caused thereby within such a period of time after the promise as it would be reasonable to allow for its performance, and as we think, for an injury suffered within any period which would not preclude all reasonable expectation that the promise might be kept."

See *G., etc., Ry. Co. v. Drew*, 59 Tex. 10; s. c., 46 Am. Rep. 261; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; s. c., 47 Am. Rep. 425; *Bell v. McGuinness*, 40 Ohio St. 204; s. c., 48 Am. Rep. 673.

In *Woodward Iron Co. v. Jones*, 80 Ala. 125, the court said: "The demurrer raises the question squarely, what change, if any, is wrought in the status of the parties, by a notice given to the employer of a defect in the machinery, and his promise to have the same remedied. If the employee, after such notice and promise, remain in the service, is this an implied agreement on his part to take the risk on himself, or is the effect to continue or revive the liability of the employer, and to absolve the employee from the imputation of contributory negligence, springing out of the continued service? The authorities are overwhelmingly in favor of the latter of these propositions, at least, until a reasonable time elapses within which to make the repairs. Waiting such a reasonable time, it would seem, if the repairs are not made, the employee should quit the service, if perilous: and failing to do so, is it illogical to presume he agrees to incur the risk? And would he not thereby be guilty of proximate contributory negligence? We propound these inquiries with no intention of answering them, as this phase of the question is not raised by this record. Our purpose is to prevent a misinterpretation of our ruling."

McDONALD V. STATE.

(51 Ala. 273.)

Constitutional law—license of railroad engineers.

A statute requiring railroad engineers to be examined and licensed by a board appointed by the governor, and making it a misdemeanor for any one to operate an engine without being thus licensed, is constitutional.

CONVICTION of operating a locomotive engine without license.
The head-note states the point.

Troy, Tompkins & London, Thos. G. Jones and Geo. P. Harrison, for appellant.

SOMERVILLE, J. The act of 1886-7, pp. 100-102, requires locomotive engineers in this State to be licensed. after examination as

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to competency and fitness, by a board authorized to be appointed by the governor for that purpose. It is insisted that the act is unconstitutional for several reasons.

The first objection is, that it is a regulation of commerce between the States, and for this reason, violative of the clause of the United States Constitution which vests in Congress the power to regulate such commerce.

In our opinion it is a mere internal police regulation, which was competent to be provided for by the State, as a proper mode of preserving the safety of the travelling public, and other persons, whose lives may well be imperiled by the negligence of ignorant and incompetent engineers. It incidentally affects inter-State commerce, but does not amount to a regulation, any more than laws licensing, by State authority, pilots of vessels engaged in such commerce, which have always been held free from constitutional objection. The laws of the several States have undertaken not only to license pilots in such cases, but have gone so far as to regulate the whole subject of pilotage and pilots, fixing their qualifications, employment and pay, including the tender of services, and on refusal to employ, authorizing the recovery of half pay. These laws have been sustained, not on the ground that Congress had recognized them as valid, for it is clear that no such recognition could confer any constitutional power on the States which they did not already possess, but upon the ground that they were necessary police regulations, having in view the public safety, or if regulations of commerce in a certain sense, they were local regulations, of such a nature as to be permissible until Congress itself undertook to exercise the same power by legislating on the subject. *Cooley v. Board of Wardens of Philadelphia*, 12 How. 143; *Ex parte Niel*, 13 Wall. 236.

There are many police regulations of this nature, incidentally affecting commerce, which have been sustained by the courts. It is well settled that the States may pass laws requiring railroads running from one State to another to fence their tracks, to ring a bell or blow a whistle on approaching a crossing or highway, to erect gates or bridges, and keep flagmen at dangerous places on highways, to stop for reasonable times at certain stations, to fix and post printed time tables, rates of fare and freights, and other things of like character, having reasonably in view the prevention of fraud and extortion, or other injury, and the preservation of the

safety of the public. *Railroad Co. v. Fuller*, 17 Wall. 560; *Mobile etc., R. Co. v. State*, 51 Miss. 137; *Com. v. Eastern R. Co.*, 103 Mass. 254; s. c., 4 Am. Rep. 555; *People v. Boston & Alb. R. Co.*, 70 N. Y. 569; *Railroad Commissioners v. Portland, etc., R. Co.*, 63 Me. 269; s. c., 18 Am. Rep. 208; *Davidson v. State*, 4 Tex. Ct. App. 545; s. c., 50 Am. Rep. 166; *Tiedeman Lim. of Police Powers*, § 194; *Cooley Const. Lim.* (5th ed.) *579 *et seq.*

The exaction of a license in such a case does not impose a direct burden upon inter-State commerce or interfere directly with its freedom. It only "acts indirectly upon the business through the local instruments to be employed, after coming within the State." It does not belong to that class of subjects which are national in their character and admit of but one system of regulation for the whole country having in view the prevention of unjust discrimination and the preservation of the freedom of transit and transportation from one State to another. *Wabash, etc., Ry. Co. v. Illinois*, 118 U. S. 557, and cases there cited.

The case of *Robbins v. Shelby County Taxing District*, 120 U. S. 489; s. c., 59 Am. Rep. 267, does not conflict with the foregoing views. The license there exacted of foreign drummers was held to be a tax on inter-State commerce. It was not a police regulation. Even in that case the stronger reasoning, in our judgment, is with the able opinion of Chief Justice WAITE concurred in by Justices FIELD and GRAY.

In *Port of Mobile v. Leloup*, 76 Ala. 401, we sustained as constitutional an ordinance of the port of Mobile imposing a license tax upon a telegraph company doing business in that city, between this and other States, which was inter-State commerce. In this we followed as authority the case of *Osborne v. Mobile*, 16 Wall. 497, in which the United States Supreme Court sustained a similar license on an express company under like circumstances. The same question had been before decided in *Southern Express Co. v. Mayor, etc., Mobile*, 49 Ala. 404. In *City of New Orleans v. Eclipse Tow-boat Co.*, 33 La. Ann. 647; s. c., 39 Am. Rep. 279, in like manner, a city ordinance exacting a license fee from the owner of tow-boats, running on the Mississippi river to and from the Gulf of Mexico, was held not unconstitutional as a regulation of commerce, upon authority of the same decision. In *Am. Union Tel. Co. v. Western Union Tel. Co.*, 67 Ala. 26, we held that the provisions of our Constitution, prohibiting foreign corporations from

doing business in this State without having at least one known place of business and an authorized agent therein, "was a legitimate exercise of the police power, and was not a regulation of commerce, as applied to a telegraph company doing business between this and other States."

2. The other objections to the law, based on constitutional grounds, are in our opinion not maintainable. It does not confer judicial power on the board appointed by the governor, nor does it deprive the citizen of his liberty or property without due process of law. The vesting, by legislative authority, of the power to license various occupations and professions, requiring skill in their exercise, or the observance of the law of hygiene, or the like, has never been construed to be obnoxious to these objections. It has been uniformly held that laws providing by accustomed modes for the licensing of physicians, lawyers, pilots, butchers, bakers, liquor dealers, and in fact all trades, professions and callings, interfere with no natural rights of the citizen secured by our Constitution. *Mayor, etc., Mobile v. Yuille*, 3 Ala. 137; s. c., 36 Am. Dec. 441; *Dorsey's case*, 7 Port. 295; *Cooper v. Schultz*, 32 How. Pr. 107, and authorities cited; *Coe v. Shultz*, 47 Barb. 64; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Reynolds v. Shultz*, 34 How. Pr. 147; *People v. Medical Society of New York*, 3 Wend. 426; *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 627; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Slaughter-House cases*, 16 Wall. 36.

The case of *Yick Wo v. Hopkins*, 118 U. S. 356, does not in our opinion, lend any favor to the contention of appellant. The municipal ordinance, there pronounced invalid, vested in the board of supervisors the arbitrary power to license public laundries at their own mere will and pleasure, without regard to discretion in the legal sense of the term, and without regard to the fitness or competency of the persons licensed, or the propriety of the locality selected for carrying on such business. Properly construed this case favors the views above expressed by us.

The rulings of the court accord with these views, and the judgment is affirmed.

Judgment affirmed.

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COMMERCIAL FIRE INSURANCE COMPANY V. CAPITAL CITY INSURANCE COMPANY.

(81 Ala. 320.)

Insurance—contract for building—insurable interest—assignment.

When a builder contracts to furnish materials and build a house for another person, at a stipulated price, payable in installments as the work progresses, and takes out a policy of insurance on the house during its construction, and it is destroyed by fire before completion, the loss is his, although he may have received partial payment by installments; and having assigned the policy to the person for whom the house was built, the latter may maintain an action on it, or may assign it to another person with whom he had effected insurance on the house.

ACTION on an insurance policy. The opinion states the case. The plaintiff had judgment below.

Troy, Tompkins & London, for appellants.

Sayre & Graves, contra.

STONE, C. J. It cannot be questioned that to maintain an action such as the present one, there must have been, when the policy was taken out and when the loss occurred, such ownership or right as amounts to an insurable interest, and the plaintiff must show himself entitled to assert that interest. *Lynch v. Dalziel*, 3 Bro. Parl. Cas. 497; *Sadlers' Company v. Badcock*, 2 Atk. 554; *Wilson v. Hill*, 3 Metc. 66; 1 Phil. Ins. 59; *May Ins.*, §§ 115, 116.

Form 16, Code of 1876, p. 704, is framed for a suit on a policy of insurance. It contains no averment of property or insurable interest in the plaintiff. In section 2979 of the Code it is provided that "any pleading which conforms substantially to the schedule of forms attached to this part is sufficient." Form 16 is one of said forms. It must be inferred that the legislature treated the averment that the policy was issued by the insurance company as equivalent, *prima facie*, of an averment that the assured owned an insurable interest in the property. Each count in the complaint is sufficient and the demurrer to it was rightly overruled. 2 Brick. Dig. 344-5.

On May 26, 1884, T. J. Holt, a builder and contractor, entered into a written agreement with Mrs. Barrett by which he bound

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himself to furnish the materials and build a house for her according to certain plans and specifications, the house to be completed by October 1, 1884, with stipulated forfeiture in case the house was not finished by the agreed time. Mrs. Barrett promised and agreed to pay Holt for so building the house "\$2,065, which payments are to be made in installments as the work progresses, but she shall reserve at least \$300 of said money until after the full completion of said house."

On August 11, 1884, the building being in progress, Holt, the contractor, took out a policy in the Commercial Fire Insurance Company insuring the building against damage by fire in the sum of \$2,000, and for two months, extending to October 10, 1884. The policy, by its terms, insures Holt, his representatives and assigns, "against loss or damage by fire, to the amount of \$2,000, builders' risk, on the frame store-house and dwelling now in process of erection," describing its locality. The house was nearing completion and Mrs. Barrett had paid Holt near \$1,900 on his contract when on September 15, 1884, it was totally destroyed by fire.

On August 30, 1884, after Mrs. Barrett had so made the advance payments to Holt she took out a policy from the Capital City Insurance Company insuring said house to her for the term of twelve months, "against loss or damage by fire, to the amount of \$2,000, permission granted to complete the construction of said building and fences. Loss, if any, payable to the Home Building and Loan Association, as its interests may appear." The house when destroyed was still in the possession of the contractor not having been delivered up to Mrs. Barrett. On the foregoing facts it is contended for appellant that Holt had no insurable interest in the property and that this action cannot be maintained.

After the fire the policy issued by the Commercial Fire Insurance Company was assigned and transferred by Holt to Mrs. Barrett, and by her to the Capital City Insurance Company. The latter company brings this suit on said policy. We are not informed on what consideration these assignments were made. Possibly Holt's transfer was made in exoneration of an asserted liability resting on him to rebuild his house, the first not having been completed and delivered to Mrs. Barrett. Possibly the Capital City Insurance Company paid the loss to Mrs. Barrett or to her appointee, and she in consideration thereof transferred to it the policy sued on in this

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action. If these surmises be true this is but a contest between the two insurance companies as to which shall bear the ultimate loss.

"It may be said generally," says May in his work on Insurance, section 76, speaking of what will constitute an insurable interest, "that while the earlier cases show a disposition to restrict it to a clear, substantial, vested pecuniary interest, and to deny its application to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance, that it can be said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition. * * * Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it." And in section 80 the same author says: "Whoever may fairly be said to have a reasonable expectation of deriving pecuniary advantage from the preservation of the subject-matter of insurance, whether that advantage inures to him personally, or as the representative of the rights or interests of another, has an insurable interest. * * *

That the person may suffer loss is a sufficient foundation for his claim to an insurable interest." Wherever property, either by force of law or by the contract of the parties, is so charged, pledged or hypothecated that it stands as a security for the payment of a debt or the performance of a legal duty, each of the parties — the owner of the lien, and the person against whose property it exists — has an insurable interest in the property. The one, that the security shall remain sufficient; the other, that it may be kept unimpaired and the property restored to his use or enjoyment in whole or in part, after the incumbrance is relieved. And each may insure his separate interest at one and the same time without incurring the imputation of double insurance, provided the applications and policies are the individual and separate acts of each. May Ins., §§ 80-87 inclusive; 1 Arnold Ins. *229 *et seq.*; Flanders Fire Ins. 343 *et seq.*; Columbia Ins. Co. v. Lawrence, 2 Pet. 25; Insurance Co. v. Stinson, 103 U. S. 25; 4 Field's Lawyers' Briefs, 282 *et seq.*; Traders' Ins. Co. v. Robert, 9 Wend. 404; Tyler v. Aetna Fire Ins. Co., 12 Wend. 507; Cone v. Niagara Ins. Co., 60 N. Y. 619; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77; Har-

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vey v. Cherry, 76 N. Y. 436; *Cumberland Bone Co. v. Andes Ins. Co.*, 64 Me. 466; *Hough v. Peoples' Fire Ins. Co.*, 36 Md. 400; *Franklin Fire Ins. Co. v. Coates*, 14 Md. 285; *Protection Fire Ins. Co. v. Hall*, 15 B. Monr. 411; *Agricultural Fire Ins. Co. v. Clancey*, 9 Bradw. 137; *Carter v. Humboldt Fire Ins. Co.*, 12 Iowa, 287. In the last case it was said, "any interest is insurable, if the peril against which insurance is made would bring upon the insured, by its immediate and direct effect, a pecuniary loss.

There are cases in the books where persons having only a lien on property to secure the payment of money due them, have, with their own means, and in their own names, taken insurance on such property, the lienor having no participation or agency in procuring the insurance, and not being in any manner provided for in the policy. Property insurance being only a contract of indemnity personal to the assured, it is held that destruction of the property and payment of the loss does not inure to the benefit of the debtor who has pledged the security. It leaves the debt still subsisting, unaffected by the payment of the loss. The reasons assigned are that the debtor paid nothing for the insurance, did not solicit it, and the policy makes no provision for his indemnification. In such cases the debt remains in full force and collectible, the same as if nothing had been paid on the policy. *White v. Brown*, 2 Cush. 412; *King v. State Mut. Fire Ins. Co.*, 7 Cush. 1; s. c., 54 Am. Dec. 683; *Suffolk Fire Ins. Co. v. Boyden*, 9 Allen, 123; *Cushing v. Thompson*, 34 Me. 496; *Concord Union Mut. Fire Ins. Co. v. Woodbury*, 45 Me. 447; *Hadley v. N. H. Fire Ins. Co.*, 55 N. H. 110; *Steele v. Franklin Fire Ins. Co.*, 17 Penn. St. 290; *Ely v. Ely*, 80 Ill. 532; *Althorff v. Wolfe*, 22 N. Y. 355; *Hamner v. Johnson*, 44 Ill. 192. See also *Mer. Ins. Co. v. Mazange*, 22 Ala. 168; *Al. Mur. Ins. Co. v. La. St. Ins. Co.*, 8 La. Ann. 1; s. c., 28 Am Dec. 117; *King v. Preston*, 11 La. Ann. 95; *Clinton v. Ins. Co.*, 45 N. Y. 454; *Henson v. Blackwell*, 4 Hare, 434. It cannot be denied however that in cases of this character, the creditor realizes double satisfaction—a result somewhat opposed to sound commercial morality.

Another principle however is gaining foothold, which may be considered the natural outgrowth of the seeming hardship of the double satisfaction mentioned above. It recognizes the fact that the two interests, such as that of the mortgagor or lienor on the one side or the mortgagee or lienee on the other, and all kindred rela-

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tions are each separately insurable. It treats the insurance obtained on property thus held, when there are no stipulations to the contrary, as simply an insurance of the interest of the party who obtains the policy, and in no broader sense an insurance of the property. Hence, when one holding property in mortgage, pledge, or hypothecation, as security merely, obtains insurance upon it, he simply strengthens his security, and obtains indemnity against its impairment by the casualty insured against. The insurer in such case is held to be a guarantor, or indemnifier of the insured, that the debt or duty shall not become lost or forfeit, by the destruction of the security or pledge. If the debt be paid, or duty performed, then even a destruction of the property insured gives no right of action against the insurer. And if in case of fire, the insurer indemnifies the assured by paying the loss, such insurer thereby becomes subrogated to the rights of the creditor or lienor against the debtor, and may compel payment in reimbursement of the loss it had paid. In the case of *Sussex Co. Mut. Ins. Co. v. Woodruff*, 2 Dutch. 541 — a case before the New Jersey Court of Errors and Appeals — this precise question was considered in a very important case. The court said: "A mortgagor and mortgagee may both insure their respective interests in the same building. The mortgagee insures his debt, and if before the policy expires the debt is paid, from that time the policy ceases to have any operation. The mortgagor has no interest in such a policy. If the property is destroyed by fire, the insurer, upon paying the insurance, is entitled to an assignment of the mortgage, if the money paid amounts to the sum secured by the mortgage. If it is less, then he has an equitable lien upon the security in the hands of the mortgagee, to the extent of the insurance money so paid."

The case of *North British & Mer. Ins. Co. v. London, Liverpool & Globe Ins. Co.*, 5 Ch. Div. 569, was decided in 1877. It was a great case. Great by reason of the amount involved, and great because it was heard before the lord justices of the High Court of Justice of England. The facts were that Barnett & Co. were wharfingers, and doing a storage business at Rotherhithe. The measure of their liability for merchandise stored with them was by custom of trade, precisely that of common carriers. They were insurers against all casualties, save those resulting from the act of God, or public enemies. All merchandise stored with them was fully covered by insurance policies, issued by various insurance com-

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panies to them, their interest being described in the policies as "the assured's own, in trust, or on commission, by which they are responsible." The North British and Mercantile Insurance Company had issued to them one of these policies, which was of force at the time of the loss hereafter described. Rodocanachi & Co., merchants, had stored with Barnett & Co. merchandise worth £40,000 sterling, on which they had partial insurance in their own favor as merchants. The London, Liverpool and Globe Insurance Company had issued one of the policies to Rodocanachi & Co. The merchandise was destroyed by fire, not the act of God, nor of the public enemy, and the insurers of Barnett & Co. fully indemnified them for the loss, who thereupon paid Rodocanachi & Co. their share of the loss. This suit was then brought by one of the insurers of Barnett & Co., which had aided in paying their loss, against the London, Liverpool and Globe Insurance Company to compel the latter company to make contribution. The prayer of the bill was denied. The principle of the decision may be gathered from the following language, extracted from the opinions in the cause.

The lord justice said: "There may be cases, where although two different persons insured in respect of different rights, each of them can recover the whole, as in the case of mortgagor and mortgagee. But whenever that is the case it will necessarily follow that one of these two has a remedy over against the other, because the same property cannot in value belong at the same time to two different persons. Each of them may have an interest which entitles him to insure for the full value, because in certain events, for instance, if the other person become insolvent, it may be he would lose the full value of the property, and therefore would have in law an insurable interest; but it must be that if each (has the right to) recover the full value of the property from their respective offices with whom they insure, one office must (in the nature of things) have a remedy against the other. I think whenever that is the case, the company which has insured the person who has the remedy over, succeeds to his right of remedy over, and then it is a case of subrogation." To the same effect are the following authorities: *Ætna Fire Ins. Co. v. Tyler*, 16 Wend. 385; s. c., 30 Am. Dec. 90; *In re Kip v. Receivers Mut. Fire Ins. Co.*, 4 Edw. Ch. 86; *Excelsior Ins. Co. v. Royal Ins. Co.*, 55 N. Y. 343; s. c., 14 Am. Rep. 371; *Honore v. Lamar Fire Ins. Co.*, 51 Ill. 409; *Norwich Fire*

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Ins. Co. v. Boemer, 52 Ill. 443; *Westchester Fire Ins. Co. v. Foster*, 90 Ill. 121; *Godsall v. Boldero*, 9 East, 72.

May, in his excellent work on Insurance, section 457 and note, scarcely gives his full assent to the doctrine stated above, when applied to cases of mere contract liability to answer over. We think however that the principle stands on impregnable grounds, and will follow it.

It is certainly true that the contract between Holt and Mrs. Barrett rested on what are called in the books independent covenants. He was not required to wait until the entire work was completed before demanding his pay; at least, before demanding all except \$300 of the entire price. *Davis v. Preston*, 6 Ala. 83; *Terry v. Duntze*, 2 H. Bl. 389; *Cunningham v. Morrell*, 10 Johns. 212; s. c.; 6 Am. Dec. 332; *Richardson v. Shaw*, 1 Mo. App. 234. *Cunningham v. Morrell*, departs from *Terry v. Duntze*, in one particular, not material to this case. *Partridge v. Forsyth*, 29 Ala. 200, is relied on as showing, first, that the contract in the present case was not an entire one; and second, that Holt had no insurable interest, and therefore there can be no recovery. *Partridge v. Forsyth* did not present its points very saliently. Examining the report of that case, it cannot fail to be seen that the appellee obtained in the trial court all his testimony entitled him to, if not more. The question of merit presented in this court was, whether there was any testimony tending to disprove the entirety of the contract. We held there was, and there being no error in the rulings of the court on this question, the judgment of the trial court was affirmed. As we have said, that case presented the single inquiry, whether Forsyth's completion of the building was a condition precedent to his right to demand compensation as the work progressed; and we ruled there was some testimony tending to disprove such term of the contract. Whether Forsyth, the contractor, was under a corresponding, independent covenant to rebuild, complete and deliver the house after the burning, was neither presented, nor decided nor considered.

The real question in this case is whether Holt, at the time of the fire, had an insurable interest in the building. That depends on another inquiry; was he bound under his contract to rebuild the house, in the event of its destruction before completion and delivery, or failing to do so, was he bound to refund to Mrs. Barrett the money she had paid him? In discussing this question, we may

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treat the Capital City Insurance Company and Mrs. Barrett as one, and the Commercial Fire Insurance Company and Holt as one. Or we may ignore both policies of insurance, and treat the contention as a suit by Mrs. Barrett against Holt to recover damages for not building and completing the house according to the plans and specifications. If she could recover in such suit, then Holt's liability to her constituted an insurable interest in him, and the present action is maintainable.

There are cases which hold that when a shipbuilder contracts to build or repair a ship and furnish the materials at an agreed price, but to be paid in installments as the work progresses, the ship becomes the property of the employer, *pro tanto*, as the payments are made. *Wood v. Bell*, decided in Queen's Bench, 5 Ellis & Blackb. 772, and in the Court of Exchequer, 6 b. 355; s. c., 34 Eng. L. and Eq. 178; *Wood v. Assignee*, 5 B. & Ald. 942; *Clark v. Spence*, 4 Ad. & Ell. 448. These however were cases where the shipbuilder had become bankrupt, and the question was whether the employer, whose money had probably procured the materials and paid for the labor, should be remitted to the status of a general creditor. They were cases of hardship, and the rulings sustained the claims of the employers. So in the case of *Menetone v. Athawes*, 3 Burr. 1592, the question arose on the repairs of a ship, where the ship was burned in dock before the repairs were completed. Lord MANSFIELD ruled that the owner was liable for the work which had been done before the ship was burned. A distinction may perhaps be drawn between a claim for repairs, and the claim for the construction of an entire ship.

So, in Chitty on Contracts (8th Am. ed.), *474, is this language: "The destruction of work by an accidental fire or other misfortune, before it is finished or delivered, does not deprive the workman of his right of remuneration to the extent of the work performed, unless by the express and uniform custom of the trade no payment is to be made until the work is completed and delivered. The author cites in support of the first principle the case of *Menetone v. Athawes*, *supra*, and in support of the exception another ruling of Lord MANSFIELD, found in *Gillet v. Mawman*, 1 Taunt. 137. In the latter case a printer had bound himself to print and deliver a number of copies of a book, had completed and delivered a part, when the residue, in an incomplete state, were burned. He sued to recover for the copies delivered, and it was ruled he could

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not recover. It is doubtful if this ruling can be vindicated, unless the books delivered in part performance had been restored to the printer.

In *Andrews v. Durant*, 11 N. Y. 35; s. c., 62 Am. Dec. 55, the foregoing cases were reviewed, and the doctrine ably discussed by Judge DENIO. He dissented from them entirely, as declarative of a general principle, and fortified his opinion with an ample array of authorities. He said: "In general a contract for the building of a vessel or other thing not yet *in esse*, does not vest any property in the party for whom it is agreed to be constructed, during the progress of the work, nor until it is finished and delivered, or at least ready for delivery, and approved by such party. And the law is the same though it be agreed that payments shall be made to the builder during the progress of the work, and such payments are made accordingly." And the following cases fully sustain the doctrine asserted by Judge DENIO: *Mucklow v. Mangles*, 1 Taunt. 318; *Adams v. Nichols*, 19 Pick. 275; s. c., 30 Am. Dec. 137; *Boyle v. Agawam Canal Co.*, 22 Pick. 381; s. c., 33 Am. Dec. 749; *Laidler v. Burlinson*, 2 Mees. & Wells. 602; *Merritt v. Johnson*, 7 Johns. 473; s. c., 5 Am. Dec. 289; *Johnson v. Hunt*, 11 Wend. 135; *Gregory v. Stryker*, 2 Denio, 628; *Halterline v. Rice*, 62 Barb. 593; *Scull v. Shakespeare*, 75 Penn. St. 297; *Philadelphia v. Brooks*, 81 Penn. St. 23; *West Jersey R. Co. v. Trenton Car Works Co.*, 32 N. J. Law, 517; *Elliott v. Edwards*, 35 N. J. Law, 265; 36 N. J. Law, 449; *Williams v. Jackman*, 16 Gray, 514; *Wright v. Tellow*, 99 Mass. 397; *Green v. Hall*, 1 Houst. 506; *Conogill v. Ford*, 2 Houst. 164; *Calias Steamboat Co. v. Scudder*, 2 Black. 372; 1 Benj. Sales (4th Am. ed.), §§ 408-413.

It will be seen by comparing the authorities cited above that the American rule differs from the English. We think those on this side the Atlantic rest on a much sounder basis, and we will follow them.*

The house not having been finished nor delivered by Holt to Mrs. Barrett, its destruction was his loss. He therefore had an insurable interest.

Judgment affirmed.

CLOPTON, J., not sitting.

* See notes, 36 Am. Rep. 436; 38 Am. Rep. 208.—REP.

Rogers v. Prattville Manufacturing Company.

ROGERS V. PRATTVILLE MANUFACTURING COMPANY.

(31 Ala. 433.)

Fixtures—machinery—test of annexation.

The mere use of machinery in a mill does not render it a fixture, but the question always depends on the use, nature and character of the annexation, and on the intention of the parties.*

MORTGAGE foreclosure. The opinion states the case. The defendant had judgment below.

Sadler & Holmes, for appellant.

C. S. G. Doster, contra.

STONE, C. J. The object of the present bill is the foreclosure of a mortgage. The mortgage was made to secure the payment of debts therein enumerated. It conveys only real estate, consisting of three several lots in the town of Prattville, describing them by fixed beginnings, metes, bearings and dimensions. At the end of the description of one of the lots conveyed is the following clause:

“The above-described lot or parcel of land, embracing the factory building used as a cotton mill; also the canal or race conducting the water to the wheel propelling the machinery in said cotton mill.” The mortgage was executed under a resolution of the stockholders of the Prattville Manufacturing Company, a private corporation, at a meeting held for the purpose. By that resolution the secretary of the company was “authorized, empowered and directed to make, execute and deliver * * * for, and as the secretary of the Prattville Manufacturing Company No. 1, a mortgage or lien upon all the real estate belonging to said company.” No authority was given to mortgage personalty, and none was mortgaged. The sole question sought to be raised by the assignments of error is, to what extent does the mortgage of the realty carry with it the machinery that was employed in operating the

*See *Hutchins v. Masterson* (46 Tex. 551), 26 Am. Rep. 286; *Thomas v. Davis* (76 Mo. 73), 43 Am. Rep. 756; *McConnell v. Blood* (123 Mass. 47), 25 Am. Rep. 13; *Hubbell v. East Cambridge, etc., Bank* (133 Mass. 447), 42 Am. Rep. 446, and note 447.

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cotton mill? To what extent has such machinery become a part of the realty, so as to pass under the mortgage?

The charge in the bill under which relief is claimed as to the machinery is in the following language: "Orator further avers that at the time of the execution of said mortgage, and since that time, the said Prattville Manufacturing Company No. 1, had and have attached and fixed to the realty large amounts, parcels and articles of machinery, such as are usually employed in the cotton manufacturing business, and your orator avers that said machinery so fixed and attached to the realty has become a part thereof, and your orator has a lien thereon by virtue of said mortgage, and the same is bound, together with the realty, for the payment of his said debt." The bill contains no other description of the machinery or fixtures sought to be subjected. The prayer of the bill is, that said mortgage be declared "a lien upon the property therein described, and upon all the machinery affixed to the realty."

The answer admits that certain enumerated articles of machinery are so attached to the freehold as to be a part of the realty, while as to other parts, it denies that they are so attached as to pass under the granting clauses of the mortgage. Schedules are attached containing the names and number of each, together with a description of the rooms in the factory in which it was said they were. It is not shown how and to what extent these various articles of machinery were attached to the realty, if attached, or used at all. The bill was filed September 6, the answer September 30, and the decree of the chancellor was rendered October 5, all in 1886. No testimony is found in the record, and we suppose none was taken, as no sufficient time therefor intervened between the filing of the answer and the rendition of the decree, granting relief to complainant. In the decree, "it is ordered and decreed that complainant's said mortgage is a lien upon the property therein mentioned, and that the same be foreclosed. But as there is some question as to what machinery is included in, or upon which said mortgage is a lien, it is ordered and decreed that all fixtures upon the realty mentioned in said mortgage, or placed upon the premises after the execution of the mortgage, are subject to the mortgage lien, both of machinery and other property; but movable property or property which is not a fixture, and which was not mentioned in said mortgage, whether placed on the premises before or after the execution of the mortgage, is not subject to the mortgage lien."

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All the authorities agree that no precise, unerring rule can be laid down, applicable to all cases, which defines the precise boundary which separates movable chattels from immovable fixtures. It varies with the different relations of parties, and is largely dependent on intention, either shown or inferred. *Tillman v. De Lacy* (MSS.), Ala.; 1 Jones Mort., § 428; *Winslow v. Mer. Ins. Co.*, 4 Metc. 306. We need not however pursue this inquiry.

The decree of the chancellor, copied above, is free from objection, as far as it goes. It lays down a correct rule; for it is certainly true that only such personalty as has in legal contemplation become annexed or affixed to the realty, passes under a conveyance of the land. As we have said, this record does not inform us to what extent, if at all, any of the machinery was annexed or attached to the freehold, so as to become a part of it. Hence, the chancellor could not have ruled, on the evidence before him, that complainant was entitled to greater relief than defendant had admitted in its answer. If the answer was not full enough, proof should have been made, so as to have the court's ruling on its sufficiency. As to the machinery which is the foundation of the assignments of error in this case, the language of the answer is, that it "is loose, and has ever been loose and unfastened machinery, and that the same is not now, and never has been in any way attached to, or fixed to the said factory building, or real estate or realty embraced and described in said mortgage." The court cannot be supposed to have any judicial knowledge of the character or uses of the machinery here referred to, and hence cannot say the chancellor erred in failing to rule, on the language of the answer alone, whether or not such machinery passed under the mortgage of the realty. We speak of it as a failure of the rule, for he certainly did not decree that any part of the machinery was not covered by the mortgage. He simply declared a rule, in very general terms it is true, but nevertheless free from error.

There are cases which hold that when a building is constructed for milling or manufacturing purposes, and is so employed, all the machinery and appliances used in connection with the business, whether attached in any way to the realty or not, become part of the realty, and a mortgage simply of the land carries with it such machinery and appliances, even without any mention being made thereof. *Voorhees v. McGinnis*, 48 N. Y. 278; *Pierce v. George*, 108 Mass. 78; s. c., 11 Am. Rep. 310; *Farrar v. Stackpole*, 11

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Greenl. 154; s. c., 19 Am. Dec. 201; *Parsons v. Copeland*, 38 Me. 537; s. c., 54 Am. Dec. 628; *Ottumwa W. Mill Co. v. Hawley*, 44 Iowa, 57; s. c., 24 Am. Rep. 719; *Winslow v. Mer. Ins. Co.*, 4 Mete. 306; s. c., 38 Am. Dec. 368; *Stockwell v. Campbell*, 39 Conn. 362; s. c., 12 Am. Rep. 393; *Millikin v. Armstrong*, 17 Ind. 456; *Queen, ex rel. v. Lee*, L. R., 1 Q. B. 241; *Holland v. Hodgson*, L. R., 7 C. P. 241; *Hoskin v. Woodward*, 45 Penn. St. 42.

Our own court has not gone to this extreme length. *McDaniel v. Moody*, 3 Stew. 314; *Tillman v. DeLacy* (MSS.), Ala. With us mere use in connection with a business, does not necessarily so annex machinery to the realty as to constitute it a part of it. Intention is more or less a factor in such inquiries.

Many of the adjudged cases declare the rule as follows: The criterion of a fixture applicable to a mill or manufactory, is the resultant of three requisites: First, actual annexation to the realty, or something appurtenant thereto. Second, application to the use or purpose to which that part of the realty with which it is connected is appropriated. Third, the intention of the party making the annexation, to make a permanent accession to the freehold. *Teaf v. Hewitt*, 1 Ohio St. 511; s. c., 59 Am. Dec. 634; 1 Jones Mort., §§ 428, 444; *Quinby v. Man. Co.*, 24 N. J. Eq. 260; *Keve v. Paxton*, 26 N. J. Eq. 107; *Blancke v. Rodgers*, 26 N. J. Eq. 563; *Capen v. Peckham*, 35 Conn. 88; *Brennan v. Whitaker*, 15 Ohio St. 446; *Cram v. Brigham*, 11 N. J. Eq. 29; *Hutchinson v. Kay*, 23 Beav. 413.

As we have said above, the precise point at which a chattel loses its character as such, and becomes part of the realty, is difficult, if not impossible to define by any fixed rule applicable to all cases. It depends so much on the use, on the nature and extent of annexation, if any, and on the intention with which the machinery is applied, that we find ourselves without sufficient information on which to formulate a rule applicable to it. We repeat, as far as the chancellor proceeded in his decree, his ruling is free from error. The present appeal brings before us only his ruling.

If the attempt were made to have us consider the register's findings and report, there are two reasons why we could not do so. First, the chancellor has not acted on the register's report. Proceedings before the register can never come immediately before us. The chancellor must first act upon them, and from his rulings only can an appeal be prosecuted to this court. But there is a second reason why the register's action in this case can never be considered,

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either by the chancellor or by this court, as we understand the chancellor's decree. After declaring the general rule copied and commented on above, the decree proceeds, as follows: "Now, by consent of parties in open court filed in writing, it is ordered and decreed that it be referred to the register to ascertain and report what machinery, if any, is not now liable to said mortgage lien, under the rule above stated, and also what machinery is fixed and liable; which report is agreed by the parties shall be final." This consent decree precludes all exception to the findings of the register, and it would seem, places them on the high plane of an arbitrament and award.

There is no error shown in the record, and the decree of the chancellor is affirmed.

Decree affirmed.

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(31 Ala. 580.)

Fraud — constructive — father and adult daughter — third person with notice.

Business transactions between a father and his unmarried daughter, who is of age, but who continues to reside with him as a member of his family, by which she assumes a pecuniary obligation for his benefit, are regarded in equity as transactions between persons occupying a fiduciary relation toward each other, and will not be sustained or enforced, unless the presumption of undue influence is rebutted, and it is shown that the daughter acted with full knowledge of the facts and had independent legal advice; and the person who advances money to the father on the credit of the daughter, under such circumstances, having knowledge of the facts, occupies no better position than the father.*

BILL to correct account. The opinion states the facts. The defendant had judgment below.

Gunter & Blakey, for appellant.

Troy, Tompkins & London, contra.

STONE, C. J. Lucy B. Noble, *nee* Lucy B. Micon, attained to her majority October 30, 1874. She had been relieved of the disabilities of minority by chancery decree rendered about twelve months before that time. She had a pretty large independent es-

* See note, 38 Am. Rep. 383.

tate inherited from her deceased mother, and her father, B. H. Micou, was the guardian of her estate until she was so relieved of the disabilities of minority. She was a member and inmate of her father's family until her marriage in October, 1879, and we are not informed that any charge was made against her for board.

B. H. Micou had been reputed to be a man of large wealth, but in 1874 he sustained financial reverses, was ruinously insolvent, and without credit. He had, through property of his wife, a second marriage, and the forbearance of his children, the use and control of two or more large plantations and the stock upon them, but he was without means or credit to conduct farming operations. Moses Brothers, real estate agents and having good credit, advanced for him without security during 1874, and thus enabled him to conduct his farming operations and to support his family. At the close of that year Micou fell indebted to them in the sum of \$3,600 over and above what the crop yielded.

At the commencement of the year 1875 Moses Brothers were unwilling to advance further to B. H. Micou on his individual credit, and they so informed him. After some negotiations between B. H. Micou and Moses Brothers, through one of their firm, it was agreed between them that the planting operations on the Prairie-Wollahatchie plantation and on the Campbell plantation, should then be conducted in the name of Lucy B. Micou, and that she should give a crop lien and mortgage on the stock and crops to be grown to secure the same. Only two witnesses, B. H. Micou and one of the Moses Brothers, speak of the terms of this agreement. B. H. Micou's testimony is as follows:

"Moses Brothers, at or about the close of 1874 or first of 1875, required some security for the balance due them by me at that time and for the advances to be made to support my family and other expenses, and to make a crop in 1875 as a condition for extending the indebtedness and for making further advances. The matter was talked over between Moses Brothers and myself, and Lucy being the only member of my immediate family who was in a condition to assume any responsibility, it was decided between us that I should obtain her consent to have the planting interest run in her name, and the stock, farming implements and provisions on the Prairie and Wollahatchie plantations, which had been bought in for the benefit of my wife, should be transferred to her and the business carried on in that way by me as her agent."

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The testimony of Moses: "Micou did desire to obtain advances to make a crop in 1875. At the time we agreed to make these advances for 1875 he stated that his daughter, Miss Lucy B. Micou, was willing for the planting to be conducted in her name and on her responsibility, and that she would assume payment of the balance of the account for 1874, and execute a mortgage to secure the balance of 1874 against B. H. Micou, and the advances to be made in 1875 for planting purposes, and B. H. Micou's family expenses, for taxes and insurance and other purposes. This was agreed to, but before the papers were executed Mr. Micou stated, and it was agreed between us that he should conduct the business on the Prairie, Wollahatchie and Campbell places as before stated, and on the Shorter place in the name of F. S. Boykin, who was to execute a mortgage to secure advances for that purpose, but with the further understanding that any profits on that place should be credited to the account of L. B. Micou at the close of the year, and losses, if any should be debited to her account."

The agreement spoken of by these witnesses was drawn up in writing and bears date March 3, 1875. B. H. Micou procured the execution of it by Lucy B. Micou. Its recitals are as follows: "Whereas I am justly indebted to Moses Brothers in the sum of \$3,000; and whereas the said Moses Brothers have agreed to furnish to me through my agent, Benjamin H. Micou, certain advances of meat, planting utensils, bagging and ties, and money to purchase other necessities and supplies to enable me to carry on certain planting operations in said State and county, that I am now conducting on the plantations lately owned and occupied by Benj. H. Micou, and known as the Prairie and Wollahatchie plantations and the Campbell plantation; and which are necessary to enable me to make a crop on said plantations. Also advances of money and supplies to my agent, Benjamin H. Micou, for family support during the time of his attention to said business, and money to pay necessary taxes and expenses, said advances to be furnished from time to time, in amounts not to exceed altogether the sum of \$500 per month during the present year." Said agreement then proceeded to convey to said Moses Brothers the stock of mules and horses on said places, and the crops of cotton and corn to be grown thereon during the year 1875, by way of mortgage, to secure said indebtedness and advances.

At the close of the year 1875, Moses Brothers were again unwilling to advance farther without other and real security. It was then agreed between them and B. H. Micou that Lucy B. Micou should execute to them a mortgage on real estate to secure the balance due to them, which was agreed on at the sum of \$13,460. Thereupon a note for that sum was drawn up, due December 1, 1876, and bearing interest from date, and a mortgage on real property as security for its payment; each of which papers B. H. Micou procured Lucy B. Micou, his daughter to execute, bearing date February 7, 1876. The mortgage conveyed her undivided half interest in certain real estate in the city of Montgomery, in the Campbell plantation, and also conveyed certain personal property and crops to be grown that year. The mortgage contained a power of sale on default.

In the reckoning and settlement which produced the balance of \$13,460, certain items of debit were included which constitute the chief contention in this suit. Among these are the following: \$2,000 of the \$3,600 left unpaid by B. H. Micou at the close of the year 1874. This was charged against Lucy B. Micou in the account of 1875, as of the first of that year. At the close of the year there was an ascertained deficit on the Shorter plantation of \$5,012. That plantation had been cultivated in the name of one Boykin, but controlled by B. H. Micou. These two sums, with interest on the \$2,000, entered into the ascertained balance of \$13,460, for which the note and mortgage were given. Moses the witness, testifies that this was in accordance with the agreement with B. H. Micou, and the latter does not controvert it.

At the close of the year 1876, Moses Brothers interposed other objections and exacted a change of security, as a condition of further indulgence, and of further accommodations. The requirement at this time was that \$13,000 of the debt, with some interest, should be placed in judgment against Lucy B. Micou. This B. H. Micou agreed to, and it was done accordingly; the judgment bearing date February term, 1877, of the City Court of Montgomery, and for the sum of \$3,053.35. In form the judgment is on jury and verdict, but the proof shows it was taken by consent. In the testimony of Moses, the witness, is the following language: "It was our purpose in part in having the judgment taken to cut off all further inquiry into the account." It is shown they had taken legal advice.

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In 1881 Moses Brothers attempted to force the collection of their said judgment by execution, and thereupon Lucy B. Noble filed this bill in January, 1882, and seeks to have the account overhauled and corrected.

As we understand the purpose and prayer of the bill, it does not seek to repudiate any proper expense incurred in the cultivation of the plantations, in the maintenance of B. H. Micou's family, in the payment of taxes, and in other expenditures incidental to these, and to the preservation and productiveness of the property. It concedes the liability of herself and her estate for meat, planting utensils, bagging and ties, and money to purchase other necessities and supplies to carry on the planting operations to be conducted in her name and on the plantations named in the agreement. It also concedes a liability for B. H. Micou's family support during the time of his attention to said business, and money to pay necessary taxes and expenses, said advances to be furnished from time to time, in amounts not to exceed altogether the sum of \$500 per month during the year, the alleged indebtedness for which constituted the basis of the mortgage and of the judgment. The chief purpose is to eliminate from the debit column of the account the two items of \$2,000 and \$5,012 described above, all other charges not falling within the classes for which she had bound herself, and all excess of interest charged above eight per cent.

Situated as B. H. Micou and his daughter then were, he financially ruined, and she is in affluent circumstances, there was something beautiful as well as natural in the filial spirit she manifested. A reasonable family settlement under such circumstances finds no condemnation in that high, yet conservative morality, which the Court of Chancery inculcates and administers. It is only when confidence is abused that courts of conscience interfere. But we need not decide this. *Frank v. Frank*, 1 Ch. Cas. 84; *Beckley v. Newland*, 2 P. Wms. 182; *Stapilton v. Stapilton*, 1 Atk. 2; *Pullen v. Ready*, 2 Atk. 592; *Cory v. Cory*, 1 Ves. Sr. 19; *Kinchant v. Kinchant*, 1 Bro. C. C. 369; *Tendril v. Smith*, 2 Atk. 85; *Wycherly v. Wycherly*, 2 Eden, 175; *Houghton v. Houghton*, 15 Beav. 278; *Brown v. Carter*, 5 Ves. 892; *Tweddell v. Tweddell*, Tur. & Russ. 1; *Cooks v. Burtchall*, 2 Dru. & War. 165; *Hannah v. Hodgson*, 30 Beav. 19; *Parfitt v. Lawless*, 2 Prob. & Div. 462; *Blackie v. Clark*, 15 Beav. 595.

The theory on which relief is claimed in this case is, that when these transactions were entered upon, complainant, the daughter and ward of B. H. Micou, had just reached her majority, and was still a member of his family; that any contract she may have made with her father, by which she incurred a heavy responsibility, or parted with a valuable interest for his use or accommodation will be referred to improper control and parental restraint, and does not bind her unless all imputation of undue influence is repelled by the proof; and that Moses Brothers, being cognizant of the relation of the parties past and present, knowing complainant's age and surroundings, stand in no better right than B. H. Micou would if he were claiming relief for his own benefit. It is claimed that no testimony has been offered disproving such parental influence, or tending to show that Lucy B. Micou had any outside advice, or that she executed the papers of her own free will, or that any explanation was made to her informing her of the nature and effect of the contract she was entering into.

Boykin, brother-in-law of the complainant, and an inmate of the family, in 1876, after she had executed the note and mortgage and the latter had been recorded, inquired of her if she knew the extent to which she had bound herself and her property, and then informed her of the amount. She expressed surprise that her father should treat her so. It is shown that Micou resented with some feeling Boykin's interference in the matter. It is not shown that Boykin gave complainant any information as to the items composing the indebtedness. It is shown that he did not inform her that the two items of \$2,000 and \$5,012 were included in the account, for he did not know it himself. With the foregoing exception, all the testimony found in the record shows Lucy B. Micou, while entering into these solemn contracts and engagements, was brought into contact only with her father; that the papers she executed were never explained to her farther than by reading them over to her; that the accounts of the several years' transactions were never so much as shown to her, and that when papers were presented to her by her father for execution she executed them without inquiry, and in trusting, filial confidence.

It is shown that until shortly before the present bill was filed — January, 1882 — Miss Micou had never been informed, and did not know that \$2,000 of her father's deficit of 1874 had been charged to her, and entered into the sum for which she gave her note and

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mortgage in February, 1876. And not until after her bill was filed did she learn that the \$5,012 deficiency in the crop grown on the Shorter place was also charged to her account, and entered into the sum she had secured by note and mortgage. This last-named item is the subject of an amendment to her bill. It is shown however by Moses Brothers, and admitted by B. H. Micou, that one of the conditions on which they agreed to advance and did advance for 1875, was that the unpaid balance for 1874 — \$3,600 — should be secured. Another fact shown and not denied is, that it was part of the agreement on which the Shorter place was worked in the name of Boykin in 1875, that if there should be an excess of debits for advances over payments realized from that place, such excess was to be charged to L. B. Micou. This excess constitutes the item of \$5,012 charged to the complainant's account for 1875. There is no proof that L. B. Micou was ever notified of either of the agreements. The written contract of March 3, 1875 — the commencement of the dealings — makes no reference to either of them. The testimony is that at the close of the crop year of 1875, B. H. Micou informed complainant, as the result of the year's planting, that she had fallen in debt \$13,460 ; and upon his requesting her to do so, she gave her note and mortgage to secure its payment.

Would this transaction stand if B. H. Micou himself were seeking to enforce the contracts against complainant and her property ? In *Archer v. Hudson*, 7 Beav. 551, Lord LANGDALE said : "Everybody will affirm in this court that if there be a pecuniary transaction between parent and child just after the child attains the age of twenty-one years, and prior to what may be called complete emancipation, without any benefit moving to the child, the presumption is that undue influence has been exercised to procure that liability on the part of the child, and it is the business and duty of the party who endeavors to maintain such a transaction, to show that the presumption is adequately rebutted, and that it may be adequately rebutted is perfectly clear. This court does not interfere to prevent an act even of bounty between parent and child, but will take care (under the circumstances in which the parent and child are placed before the emancipation of the child), that such child is placed in such a position as will enable him to form an entirely free and unfettered judgment, independent altogether of any sort of control." In *Houghton v. Houghton*, 15 Beav. 278. 279. Sir JOHN ROMILLY said: "In many cases the court, from

the relations existing between the parties to the transaction, infers the probability of such undue influence having been exerted. There are cases of guardian and ward, of solicitor and client, spiritual director and pupil, medical adviser and patient, and the like; and in such cases the court watches the whole transaction with great jealousy, not merely for the purpose of ascertaining that the person likely to be so influenced fully understood the act he was performing, but also for the purpose of ascertaining that his consent to perform that act, was not obtained by reason of the influence possessed by the person receiving the benefit; not that the influence itself, flowing from such relations, is either blamed or discountenanced by the court; on the contrary, the due exercise of it is considered useful and advantageous to society; but this court holds, as an inseparable condition, that this influence should be exerted for the benefit of the person subject to it, and not for the advantage of the person possessing it. The case of parent and child is undoubtedly one of this class of cases, and it is prominently put forward as such in all cases illustrating this principle." *Heron v. Heron*, 2 Atk. 161; *Carpenter v. Heriot*, 1 Eden, 338; *Cocking v. Pratt*, 1 Ves. Sr. 401; *Hawes v. Wyatt*, 3 Bro. C. C. 156; *Huguenin v. Baseley*, 14 Ves. 273, and notes, 2 Lead. Cas. in Eq. (4th Am. ed.) 1156. In that excellent treatise Pomeroy's Eq. Jur., vol. 2, section 956, is this language: "While equity does not deny the possibility of valid transactions between the two parties, yet because every fiduciary relation implies a condition of superiority held by one of the parties over the other, in every transaction between them by which the superior party obtains a possible benefit, equity raises a presumption against its validity, and casts upon that party the burden of proving affirmatively its compliance with equitable requisites, and of thereby overcoming the presumption." In *Rhodes v. Bate*, L. R., 1 Ch. App. Cas. 252, 257, Sir J. G. TURNER, lord justice, said: "I take it to be a well-established principle of the court, that persons standing in confidential relation toward others cannot entitle themselves to hold benefits which those others may have conferred on them, unless they can show to the satisfaction of the court that the persons by whom the benefits had been conferred had competent and independent advice in conferring them." Such has been the almost unbroken current of decisions on each side of the Atlantic, from the very dawn of well-defined equity jurisprudence. 1 Story Eq. Jur., § 307.

Alabama, at an early day, placed herself squarely abreast with England and with her sister States, on the question we have in hand. In *Johnson v. Johnson*, 5 Ala. 90—decided in 1843—this court said: "Contracts made by persons between whom relation of trustee and *cestui que trust* exists, are viewed with so much jealousy by Courts of Chancery that they are voidable by the latter if, within a reasonable time, he seeks to set the contract aside, and can be supported only when the trustee previous to the contract has made such a full disclosure of all the facts and circumstances which have come to his knowledge as trustee to the *cestui que trust*, as to enable the latter to deal with him on equal terms." In *Malone v. Kelly*, 54 Ala. 532, the language of the court is that "if either of the known legal relations of guardian and ward, trustee and *cestui que trust*, attorney and client, or any other relation in which a confidence is reposed and accepted, or influence acquired, exists between the parties, on him to whom the confidence is extended, and who has acquired the influence, if he claims the benefit of the contract, the law on a principle of public policy, casts the duty of proving its fairness, and that it is untainted with a violation of the confidence reposed, or an undue exercise of the influence of the relation." In *Voltz v. Voltz*, 75 Ala. 555, this court said: "Even if the relation of trustee and beneficiary has terminated, courts regard with distrust and *prima facie* disapprobation all dealings in property between them, until a sufficient time has elapsed for all presumption of undue influence to have ceased. And there are sound reasons for such a rule. The trustee stands as a guardian, protector, and in many cases the adviser of the *cestui que trust*. He must bestow the same care, diligence and watchfulness upon the personal and pecuniary interests confided to him, as an ordinarily prudent man bestows on his own similar interests. He is on watch, not of his own, but of another's property rights. He should not, and cannot rightfully strike a bargain with his beneficiary, which he would not advise and approve, if proposed by a stranger; and when he attempts to deal with his beneficiary, he is placed in the repugnant dual attitude of being forced by duty to give his counsel, watchfulness, best judgment and trading capacity to another, against his own personal pecuniary interest, if antagonistic." *Juzan v. Toulmin*, 9 Ala. 662; s. c., 44 Am. Dec. 448; *Boney v. Hollingsworth*, 23 Ala. 690; *Thompson v. Lee*, 31 Ala. 292; *Cleveland v. Pollard*,

37 Ala. 556; *Dickinson v. Bradford*, 59 Ala. 581; *Waddell v. Lanier*, 62 Ala. 347; *Shipman v. Furniss*, 69 Ala. 555.

There can be no question that if this were a contention between B. H. Micon, the father, and Lucy B., the daughter, the contracts would be set aside, as presumptively obtained by undue parental influence.

In *Perry on Trusts*, section 201, is found this language: "The law * * * does not presume in the first instance that a parent would make use of his authority and parental power to coerce, deceive or defraud the child. Therefore it is always necessary to prove some improper and undue influence in order to set aside contracts between parents and children." The only authority he cites which sustains him is *Jenkins v. Pye*, 12 Pet. 241. The majority opinion, delivered by THOMPSON, J., is confessedly opposed to the English authorities, and is supported by no ruling cited by its author. None can be found which agrees with him, so far as our investigation has extended. The bill was fatally bad on the ground of staleness, and was rightly dismissed for that reason. Judge CATRON, while concurring in the conclusion, filed an able opinion, in which he dissented entirely from the principle announced above. In the later case of *Taylor v. Taylor*, 8 How. 183, the case of *Jenkins v. Pye* was reviewed and explained, and its authority, at least, impaired. And the case of *Allore v. Jewell*, 94 U. S. 506, as we understand it, departs entirely from the principle declared in the case of *Jenkins v. Pye* by THOMPSON, J., and follows the English doctrine declared above. Speaking of the case of *Jenkins v. Pye*, the learned author of the American notes to the fourth edition of *Leading Cases in Equity*, vol. 2, page 1205, says: "But for the last mentioned ground (staleness) this judgment could scarcely be reconciled with the general course of decision." See collection of authorities by him, pp. 1192-1204. And in 2 Pom. Eq. 495, note 3, that great and painstaking author takes decided ground against the soundness of the ruling in *Jenkins v. Pye*.

It may as well be stated here, as elsewhere, that this record contains no evidence that either Boykin or any one else ever informed Miss Micon, until after her marriage, and her husband obtained counsel, that she had any show of defense against the note and mortgage, on the ground of imputed undue influence. *Voltz v. Voltz*, 75 Ala. 555.

Have Moses Brothers a better footing than would B. H. Micon have if he were suing?

The only witness examined for Moses Brothers was one of the firm. He testified that the firm had no personal interview with L. B. Micou, the daughter, and that all their dealings with her had been through B. H. Micou, her father, styled in the papers her agent. They had no knowledge of the communications made to her, save that evidenced by the papers she executed. In his testimony is the following language: "We knew that complainant was twenty-two or twenty-three years of age, and that before she arrived at twenty-one years of age a sufficient showing of her capacity to manage her own affairs was made to induce a Chancery Court to relieve her of the disabilities of non-age * * * . Up to and prior to the confession of said judgment, we knew that complainant was a young woman living with her father, B. H. Micou, and that he had been her guardian until the removal of her disabilities before she became of age; and that at the time of the confession of said judgment she was about twenty-three or twenty-four years of age, and that said B. H. Micou was insolvent. * * * I regarded B. H. Micou as carrying on the business for his own benefit, but in the name and on the credit of complainant, and by her consent, and that he was authorized to make all the charges shown in said account against her estate * * * . In the dealings had with us, we recognized that the plantations were carried on by B. H. Micou for his own benefit and advantage, but in the name and on the credit of L. B. Micou."

In *Mailland v. Irving*, 15 Sim. 437, Maclean was indebted to Irving & Brown, and desired to obtain indulgence on the indebtedness. He had a niece living with him, Miss Maitland, whose guardian he had been. She was in her twenty-third year. The material facts and principles of the case are briefly and clearly stated by Hare & Wallace in 2 Lead. Eq. Cas. (4th ed.) 1190, as follows: "Irving & Brown consented to postpone the payment of £5,000, due to them from Maclean, in consideration of his procuring and giving the guarantee of the plaintiff, Miss Maitland, for that sum; and Maclean at the same time informed Irving & Brown that Miss Maitland was his niece, and was possessed of considerable property; that she had resided with him for some time; that he had been her guardian, and that she had been of age about a year and a half. The guarantee was given. Afterward another (agreement) was made between Irving & Brown and Maclean, in pursuance of which Irving & Brown delivered up the guarantee, and Maclean pro-

cured and gave them plaintiff's (Miss Maitland's) check for £3,000, and her promissory note for £1,200, as security for his paying them those sums. Sir L. SHADWELL, V. C., granted and afterward continued an injunction, restraining Irving & Brown from prosecuting an action against the plaintiff to recover the £3,000; and notwithstanding they had obtained a verdict, he refused to order the money to be paid into the court. The case, said his honor, has been argued for the defendants as if it were a case in which they had some ground to resist the rule in equity, because of their not being volunteers. But no consideration whatever was given to the young lady; on the contrary, she was induced to do the act upon an application made to her by a person who, if he had performed his duty, would have advised her not to do that which he applied to her to do. * * * The facts of the case seem to me to amount to this: That Irving & Brown, knowing the defenseless situation of the young lady, combined with Maclean, who disclosed it to them, in order that advantage might be taken of her defenseless situation, for the benefit of all the three. And my opinion is that all three be considered as standing in in the same situation."

In *Archer v. Hudson*, 7 Beav. 551, a niece, two months after she came of age, and after her guardian had fully accounted to her, entered into a voluntary security for her uncle with whom she resided, to his banker; as a condition upon which the uncle would be permitted to overdraw his account. Hanxwell was manager of the bank. The bill was filed by the niece, then Mrs. Archer, to be relieved of the liability. Lord LANGDALE, master of the rolls, said: "It does not appear that this young lady was ever severed from the influence which the uncle and aunt had over her, so as to enable her to form an adequate, full and independent opinion as to what she ought in prudence to have done. I do not mean to say that if this young lady had her trustees, or some friend or relation of the family, or somebody interested in her welfare, to advise and consult with in the absence of the uncle and aunt, that the circumstance of her situation and the circumstance of her uncle's situation might not have been such that this court would have said that having entered into this liability, she should be held by it. It might have been so; but to say that Mr. Hanxwell, the agent of the bank, a person with whom the uncle was dealing, the person with whom he is carrying on his business as customer of the bank, by explaining to an inexperienced young woman, who had just attained her age of

twenty-one years, the meaning of this note, offered any thing like such a protection as would secure to her that free and independent judgment which she had a right to exercise, seems to me to go far beyond any thing which has been proved in this case. It does not appear to me, taking this transaction as it stands upon the evidence before me, that it can be supported."

In the last case the uncle, Daniel, had not been guardian to the young lady. The master of the rolls found as fact that it was "fully proved that Mr. Hauxwell was well acquainted with the relative situation of Mr. Daniel and the young lady."

In *Espy v. Lake*, 10 Hare, 260, Miss Espy had become surety for her step-father, Speakman, in a promissory note payable to Lake. The note was for borrowed money. Suit was instituted on the note. Miss Espy filed her bill to restrain its collection after verdict had been rendered, but before judgment. Neither actual fraud, misrepresentation, nor undue influence was shown, but the case went off on the presumption the law raises from the relation of the parties. The vice-chancellor, in delivering the opinion of the court, said: "I take it to be quite clear that the principles of this court go to this extent — that in the case of a security taken from a person just of age, living under the influence and in the house of another person, with a relationship subsisting between such other from whom security is taken, which constitutes any thing in the nature of a trust, or any thing approaching to the relation of guardian and ward, or of standing *in loco parentis* to the surety, this court will not allow such security to be enforced against the person from whom it is taken, unless the court shall be perfectly satisfied that the security was given freely and voluntarily, and without any influence having been exercised by the party in whose favor the security is made, or by the party who was the medium or instrument in obtaining it. * * * It is said by Lake that he took no part in the transaction, and that he left it entirely to Speakman. I impute no moral fraud to Lake in the course of the transaction. I do not believe that there was any moral fraud on his part, nor might he have been aware of the principles which guide the court with regard to securities taken from a person in the situation of Miss Espy at that time. But what does the defendant say? Why, he left it wholly to Speakman. That is, he himself allowed a party standing in the relation of guardian to this young lady to persuade her to join in this security for the sum of £500. In the application of the

principles of the court, I see no distinction between the case of one who himself exercises a direct influence, or another who makes himself a party with the guardian who obtains such a security from his ward. The defendant Lake left it to Speakman, who had influence over his young ward, as she may be called, to induce her to join in the security, thereby placing her more directly under undue influence than if he had applied for the security himself. Such a security cannot be maintained consistently with the principles of this court." It should be remarked that Speakman was not, and never had been the legal guardian of Miss Espy.

The great case of *Savery v. King*, 5 H. of L. 627, was decided by the British House of Lords in 1856. The opinion was prepared by CRANWORTH, lord chancellor, and fully concurred in by the House of Lords. Lord BROUGHAM, one of the peers, expressed his concurrence in a brief, separate opinion. Savery was an attorney and solicitor, and John King had been his client. Through John's influence Richard, his son, after reaching his majority, so changed the tenure of his estate as to enable him to pledge it, and actually did incumber it as security for his father, John King, to Savery. The bill was filed by Richard King, alleging undue influence, and seeking to relieve himself of the liability he had incurred for his father, and his estate of incumbrance he had placed upon it in favor of Savery. No actual fraud or intentional wrong was imputable to Savery, and the distinguished chancellor and ex-chancellor each relieved him of all such imputation. The court granted to Richard King full relief. Great names appear in the argument. Among them that of Sir WILLIAM FOLLETT. This case is highly instructive in this most conservative branch of equity jurisprudence. The following cases assert substantially the same doctrine as that set forth above. *Maitland v. Backhouse*, 16 Sim. 58; *Baker v. Bradley*, 7 DeG., M. & G. 597; *Kempson v. Ashbee*, L. R., 10 Ch. App. 15; See *May v. LeClaire*, 11 Wall. 217, 233; *Yonge v. Hooper*, 73 Ala. 119.

Appellees cite and rely on *Green v. Thompson*, 2 Ired. Eq. 365; *Nace v. Boyer*, 30 Penn. St. 99; *Atlantic Delaine Co. v. James*, 94 U. S. 207, and *DeRonge v. Elliott*, 23 N. J. Eq. 486. In the first three of these cases there was no fiduciary relation, and hence no question of undue influence could arise. In the New Jersey case De Ronge had taken out a policy of insurance on his life, payable to his wife at his death. It is not stated that his wife had paid the

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premiums, or had parted with any thing that was hers. The husband became greatly embarrassed, and was arrested for debt. To relieve him from the great distress of mind under which he was laboring, the wife united with the husband in an assignment of the policy to his creditors. After his death the wife exhibited her bill to restrain and enjoin the payment of the loss to the assignee. Relief was denied her, the court finding there had been no duress, and that she fully understood the transaction. The case was very like that of *Holt v. Agnew*, 67 Ala. 360.

It is claimed for appellees that all inquiry into anterior dealings between these parties was foreclosed by the rendition of judgment at the February term, 1877. The argument is, that inasmuch as appellant's intestate, Mrs. Lucy B. Noble, was represented by counsel when the judgment was rendered against her, that fact repels the presumption of undue parental influence, and renders the judgment conclusive as to all matters of debit which are embraced within it. *Corbett v. Brock*, 20 Beav. 524, is relied on as supporting this view. In that case the creditor required, before he would accept the security, the obligation of a Miss Colyer, that the security proposed should be read by a solicitor on her behalf. This was complied with, and before it was accepted the solicitor approved it on her part. It was then executed, the said solicitor being present. The court, Sir JOHN ROMILLY, denied her relief from the obligation.

The present case is entirely different. Lucy B. had no counsel whatever, save that of her father, when she executed the note and mortgage. Nor had she any independent advice when she accepted service of the summons, which led to the judgment against her, although the attorney of Moses Brothers was present, and procured her acceptance of service. The only explanation then made to her, so far as this record informs us, was a statement made by her father, "that it was the same debt as the mortgage debt, and that Moses Brothers wanted to change the shape of the debt." The reason given by Moses Brothers why they wanted the claim reduced to judgment, is furnished in the following answer by one of the firm, when examined as a witness, the only testimony offered by them on the subject: "The reason why we wished a judgment instead of a mortgage was, because we could use it as a better collateral in raising money, and we considered it a more satisfactory form for the account to be in; and because it would prevent the

necessity, in case of the death of either party, or in case of the marriage of Miss Micou, of perhaps having to go over all the accounts and vouchers with an executor or husband, which would involve the expenditure of great labor, time and trouble. In short, we wished a complete settlement of the account while the matters were fresh in the minds of the parties to the transactions, and such a settlement as would be final and binding on both parties.

And it is equally true that she had no independent advice, either before, or at the time the judgment was rendered. All that the present record shows in relation of employment of counsel by her, must be gathered from the following facts shown by the record: The bill, after stating that complainant's father, B. H. Micou, "undertook to obtain from her, for them (Moses Brothers) a consent that judgment should be rendered against her upon said note;" and after averring the acceptance of service by her, referred to above, charges that "oratrix, at the instance of her said father, B. H. Micou, wrote to D. P. B., an attorney of said court, directing him to appear for oratrix in said cause, and consent that said Moses Brothers should take a judgment for the amount claimed by them to be due on said note."

The answer is very full upon most subjects, and denies all personal influence exerted by Moses Brothers on Miss Micou. It even denies that they ever had any interview with her in relation to the subject-matter of this bill, or any communication with her, except through her father. It makes no allusion whatever to the charge copied last above, and neither pleads nor sets up in bar of recovery the fact that in the matter of recovering the judgment Miss Micou was represented by counsel. And defendants, appellees, offer no testimony on this particular subject. On the other hand, it was testified by Mrs. Noble, appellant's intestate, that her "father wrote out a paper and requested her to copy it and send it to Col. B." (attorney); and that in that paper she "directed him (the attorney) to confess judgment. Did not know the effect of that paper, nor what a judgment was." The testimony of B. H. Micou, the father, is as follows: "Mr. J. W. M., the attorney of Messrs. Moses Brothers came and obtained her assent in form, and he, or Messrs. Moses Brothers gave me a form of a letter or note that she was to direct to her attorney, Col. B., to appear for her in court and confess judgment. She copied the form of said letter and signed the same, and handed it to me." The foregoing is all the record contains, tending to

show Miss Micou had personal, independent counsel. It falls very far short of the rule required in such cases. It is much below the measure of advice Richard King had in *Savery v. King*, 5 H. L. 627, and yet that court set the conveyance aside, on the ground of presumed undue influence, which the court thought was not sufficiently rebutted.

The judgment in this case was obtained through imputed undue influence, not rebutted nor explained away by any testimony found in the record. That influence is of the nature of constructive fraud, which vitiates all transactions, even the solemn judgments of courts, and is one of the acknowledged equitable grounds for setting aside judgments at law. 1 Brick. Dig. 666, § 376; *Yonge v. Hooper*, 73 Ala. 119.

Moses Brothers, as to the items the bill seeks relief against, stand in no better right than would B. H. Micou, if he were suing. We think in this we stand on impregnable ground; for as to these items, not only the complainant, but Boykin, her only advising friend, were in utter ignorance that they had been charged against her, until after the last transactions were had in her name, or upon her credit. So she was without information on which to form an independent opinion.

It is further objected that there is a material and fatal variance between the allegations and proof in this case. The alleged variance is, that while Mrs. Noble charged in her bill that the plantations were cultivated by her as principal, through B. H. Micou, as her agent, in reality he was the principal, and she only his surety. The writings between the parties evidencing their dealings, declare and fix the status of the parties precisely as it is set forth in the bill. Possibly the claim to relief would have been stronger, if the bill had truly set forth B. H. Micou's true relation to the transaction, for it would then have negatived all semblance of consideration moving to Miss Micou. It averred the contract as the parties expressed it in their writings, and it is sufficient. When a bill truly sets forth sufficient facts to entitle complainant to relief, the pleader may or may not at his option aver additional, cumulative facts, which only intensify, without varying the principle of relief claimed.

In what we have said above, we necessarily overrule the decision in this cause when it was formerly before us. *Noble v. Moses*, 74 Ala. 604; Code of 1876, § 579.

We have declared above that Miss Micou, then Mrs. Noble, did not and does not by her bill claim or pray to be relieved of the entire liability she incurred by her agreement of March 3, 1875, and by her mortgage of February 7, 1876. The purpose was to eliminate from the account the balance of \$2,000, brought from the account of 1874, and charged to her at the beginning of 1875, with its interest. Also the balance of Boykin's account for advances made for the Shorter place in 1875, charged to Miss Micou at the close of that year. Also all items of the account from the beginning, which are not provided for in the agreement of March 3, 1875, and all interest and charges on moneys and other things advanced, loaned or forborne over and above eight per cent per annum. To this extent she is clearly entitled to relief with this qualification. There is some testimony that some part of the product of the crop grown on the Shorter place in 1875, went to Miss Micou's credit with Moses Brothers, or to her advantage in the continued cultivation of the plantations by her after that time. If such was the case the credit of \$5,012 deficit of the Brown crop must be reduced to that extent. And in stating the account annual rests must be made where payments have been made during the year, but in no event so as to charge interest upon interest.

She is entitled to credit for all sums paid from her property or property covered by the mortgages, or from her own private means.

In taking the account the judgment will cut no figure whatever, either as conferring or taking away any rights. And as what is known as the Lehman, Durr & Co. acceptances were part of the adjustment which led to the judgment, that transaction will be entirely disregarded in taking the account as conferring on Mrs. Noble no right to claim a credit therefor, and as a consequence, dispensing with all inquiry as to the propriety of charging it back against Mrs. Noble.

We will not attempt a decretal order of reference. The chancellor, aided by the suggestions of counsel, can perform this service much better than we have the means of doing. We leave this subject entirely open for his consideration, with the exception that he will be governed by the principles declared above.

Reversed and remanded.

SOMERVILLE, J., dissenting.

PARSONS V. STATE.

(81 Ala. 577.)

Criminal law — homicide — insanity — proper rule of responsibility.

One who by reason of mental disease has lost the power of will to control his actions and choose between right and wrong, is not responsible to the criminal law for an act which is solely the product of such disease, although he may know right from wrong. (*See note, p. 212.*)

The existence or non-existence of the disease of insanity, such as may fall within the above rule, is a question of fact to be determined in each particular case by the jury, enlightened, if necessary, by the testimony of experts.

When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal.

CONVICTION of murder. The opinion states the case.

Smith & Lowe and *William Bethea*, for appellants.

T. N. McClellan, attorney-general, *contra*.

SOMERVILLE, J. In this case the defendants have been convicted of the murder of Bennett Parsons by shooting him with a gun, one of the defendants being the wife and the other the daughter of the deceased. The defense set up in the trial was the plea of insanity, the evidence tending to show that the daughter was an idiot and the mother and wife a lunatic, subject to insane delusions, and that the killing on her part was the offspring and product of those delusions.

The rulings of the court raise some questions of no less difficulty than of interest, for as observed by a distinguished American judge, "of all medico-legal questions those connected with insanity are the most difficult and perplexing." Per DILLON, C. J., in *State v. Feller*, 35 Iowa, 67. It has become of late a matter of comment among intelligent men, including the most advanced thinkers in the medical and legal professions, that the deliverances of the law courts on this branch of our jurisprudence have not heretofore been at all satisfactory either in the soundness of their theories or in their practical application. The earliest English decisions striving to establish rules and tests on the subject, including alike the legal

rules of criminal and civil responsibility and the supposed tests of the existence of the disease of insanity itself, are now admitted to have been deplorably erroneous, and to say nothing of their vacillating character, have long since been abandoned. The views of the ablest of the old text-writers and sages of the law were equally confused and uncertain in the treatment of these subjects and they are now entirely exploded. Time was in the history of our laws that the veriest lunatic was debarred from pleading his providential affliction as a defense to his contracts. It was said in justification of so absurd a rule that no one could be permitted to stultify himself by pleading his own disability. So great a jurist as Lord COKE, in his attempted classification of madmen, laid down the legal rule of criminal responsibility to be that one should "wholly have lost his memory and understanding;" as to which Mr. ERSKINE, when defending Hadfield for shooting the king in the year 1800, justly observed: "No such madman ever existed in the world." After this great and historical case, the existence of delusion promised for a while to become the sole test of insanity, and acting under the duress of such delusion was recognized in effect as the legal rule of responsibility. Lord KENYON, after ordering a verdict of acquittal in that case, declared with emphasis that there was "no doubt on earth" the law was correctly stated in the argument of counsel. But as it was soon discovered that insanity often existed without delusions, as well as delusions without insanity, this view was also abandoned. Lord HALE had before declared that the rule of responsibility was measured by the mental capacity possessed by a child fourteen years of age, and Mr. Justice TRACY and other judges had ventured to decide that to be non-punishable for alleged acts of crime, "a man must be totally deprived of his understanding and memory so as not to know what he was doing no more than an infant, a brute, or a wild beast." *Arnold's case*, 16 How. St. Tr. 764. All these rules have necessarily been discarded in modern times in the light of the new scientific knowledge acquired by a more thorough study of the disease of insanity. In *Bellingham's case*, decided in 1812, by Lord MANSFIELD at the Old Bailey (Coll. Lun. 630), the test was held to consist in a knowledge that murder, the crime there committed, was "against the laws of God and nature," thus meaning an ability to distinguish between right and wrong in the abstract. This rule was not adhered to but seems to have been modified so as to make the test

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rather a knowledge of right and wrong as applied to the particular act. *Lawson Insanity*, 231, § 7 *et seq.* The great leading case on this subject in England, is *McNaghten's* case, decided in 1843 before the English House of Lords, 10 Cl. & F. 200; 2 *Lawson's Cr. Def.* 150. It was decided by the judges in that case, that in order to entitle the accused to acquittal, it must be clearly proved that at the time of committing the offense he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did, not to know that what he was doing was wrong. This rule is commonly supposed to have heretofore been adopted by this court and has been followed by the general current of American adjudications. *Boswell v. State* 63 Ala. 307; 2 *Lawson's Cr. Def.* 352; s. c., 35 Am Rep. 20; *McAllister v. State*, 17 Ala. 434; *Lawson Insanity*, 219-221, 231.

In view of these conflicting decisions and of the new light thrown on the disease of insanity by the discoveries of modern psychological medicine, the courts of the country may well hesitate before blindly following in the unsteady footsteps found upon the old sandstones of our common-law jurisprudence a century ago. The trial court, with prudent propriety, followed the previous decisions of this court, the correctness of which, as to this subject, we are now requested to review.

We do not hesitate to say that we reopen the discussion of this subject with no little reluctance, having long hesitated to disturb our past decisions on this branch of the law. Nothing could induce us to do so except an imperious sense of duty which has been excited by a protracted investigation and study, impressing our minds with the conviction that the law of insanity as declared by the courts on many points, and especially the rule of criminal accountability and the assumed tests of disease to that extent which confers legal irresponsibility, have not kept pace with the progress of thought and discovery in the present advanced stages of medical science. Though science has led the way, the courts of England have declined to follow, as shown by their adherence to the rulings in *McNaghten's* case, emphasized by the strange declaration made by the lord chancellor of England, in the House of Lords, on so late a day as March 11, 1862, that "the introduction of medical opinions and medical theories into this subject has proceeded upon the vicious principle of considering insanity as a disease?"

It is not surprising that this state of affairs has elicited from a learned law writer, who treats of this subject, the humiliating declaration, that under the influence of these ancient theories, "the memorials of our jurisprudence are written all over with cases in which those who are now understood to have been insane have been executed as criminals. 1 Bish. Crim. Law (7th ed.), § 390. There is good reason both for this fact and for the existence of unsatisfactory rules on this subject. In what we say we do not intend to give countenance to acquittals of criminals, frequent examples of which have been witnessed in modern times, based on the doctrine of moral or emotional insanity unconnected with mental disease, which is not yet sufficiently supported by psychology or recognized by law as an excuse for crime. *Boswell's case, supra*; 1 Whart. Cr. Law (9th ed.), § 43.

In ancient times lunatics were not regarded as "unfortunate sufferers from disease, but rather as subjects of demoniacal possession, or as self-made victims of evil passions." They were not cared for humanely in asylums and hospitals, but were incarcerated in jails, punished with chains and stripes, and often sentenced to death by burning or the gibbet. When put on their trial, the issue before the court then was not as now. If acquitted they could only be turned loose on the community to repeat their crimes without molestation or restraint. They could not be committed to hospitals, as at the present day, to be kept in custody, cared for by medical attention, and often cured. It was not until the beginning of the present century that the progress of Christian civilization asserted itself by the exposure of the then existing barbarities, and that the outcry of philanthropists succeeded in eliciting an investigation of the British Parliament looking to their suppression. Up to that period the medical treatment of the insane is known to have been conducted upon a basis of ignorance, inhumanity and empiricism. 9 Amer. Cyclop. (1874), title, Insanity. Being punished for wickedness, rather than treated for disease, this is not surprising. The exposure of these evils not only led to the establishment of that most beneficent of modern civilized charities—the hospital and asylum for the insane—but also furnished hitherto unequalled opportunities to the medical profession of investigating and treating insanity on the pathological basis of its being a disease of the mind. Under these new and more favorable conditions the medical jurisprudence of insanity has assumed an entirely new phase.

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The nature and exciting causes of the disease have been thoroughly studied and more fully comprehended. The result is that the "right and wrong test," as it is sometimes called, which it must be remembered itself originated with the medical profession in the mere dawn of the scientific knowledge of insanity has been condemned by the great current of modern medical authorities, who believe it to be "founded on an ignorant and imperfect view of the disease." 15 Encyc. Brit. (9th ed.), title, Insanity.

The question then presented seems to be whether an old rule of legal responsibility shall be adhered to, based on theories of physicians promulgated a hundred years ago, which refuse to recognize any evidence of insanity, except the single test of mental capacity to distinguish right and wrong — or whether the courts will recognize as a possible fact, if capable of proof by clear and satisfactory testimony, the doctrine now alleged by those of the medical profession who have made insanity a special subject of investigation, that the old test is wrong, and that there is no single test by which the existence of the disease, to that degree which exempts from punishment, can in every case be infallibly detected. The inquiry must not be unduly obstructed by the doctrine of *stare decisis*, for the life of the common-law system and the hope of its permanency consist largely in its power of adaptation to new scientific discoveries and the requirements of an ever advancing civilization. There is inherent in it the vital principle of juridical evolution, which preserves itself by a constant struggle for approximation to the highest practical wisdom. It is not like the laws of the Medes and Persians, which could not be changed. In establishing any new rule we should strive however to have proper regard for two opposite aspects of the subject, lest in the words of Lord HALE, "on the one side there be a kind of inhumanity toward the defects of human nature, or on the other too great indulgence to great crimes."

It is everywhere admitted, and as to this there can be no doubt, that an idiot, lunatic or other person of diseased mind, who is afflicted to such extent as not to know whether he is doing right or wrong, is not punishable for any act which he may do while in that state.

Can the courts justly say however that their only test or rule of responsibility in criminal cases is the power to distinguish right from wrong, whether in the abstract, or as applied to the particular case? Or may there not be insane persons, of a diseased brain, who, while

capable of perceiving the difference between right and wrong, are, as matter of fact, so far under the duress of such disease as to destroy the power to choose between right and wrong? Will the courts assume as a fact, not to be rebutted by any amount of evidence, or any new discoveries of medical science, that there is, and can be no such state of the mind as that described by a writer on psychological medicine, as one "in which the reason has lost its empire over the passions, and the actions by which they are manifested, to such a degree that the individual can neither repress the former, nor abstain from the latter?" Dean's Med. Jur. 497.

Much confusion can be avoided in the discussion of this subject by separating the duty of the jury from that of the court in the trial of a case of this character. The province of the jury is to determine facts, that of the court to state the law. The rule in *McNaghten's* case arrogates to the court, in legal effect, the right to assert, as matter of law, the following propositions:

1. That there is but a single test of the existence of that degree of insanity, such as confers irresponsibility for crime.

2. That there does not exist any case of such insanity in which that single test, the capacity to distinguish right from wrong, does not appear.

3. That all other evidences of alleged insanity, supposed by physicians and experts to indicate a destruction of the freedom of human will, and the irresistible duress of one's actions, do not destroy his mental capacity to entertain a criminal intent.

The whole difficulty, as justly said by the Supreme Judicial Court of New Hampshire, is that "courts have undertaken to declare that to be law which is matter of fact." "If," observes the same court, "the tests of insanity are matters of law, the practice of allowing experts to testify what they are should be discontinued; if they are matters of fact, the judge should no longer testify without being sworn as a witness, and showing himself to be qualified to testify as an expert." *State v. Pike*, 49 N. H. 399.

We first consider what is the proper legal rule of responsibility in criminal cases.

No one can deny that there must be two constituent elements of legal responsibility in the commission of every crime, and no rule can be just and reasonable which fails to recognize either of them: (1) Capacity of intellectual discrimination; and (2) Freedom of will. Mr. Wharton, after recognizing this fundamental

and obvious principle, observes: "If there be either incapacity to distinguish between right and wrong as to the particular act or delusion as to the act, or inability to refrain from doing the act, there is no responsibility." 1 Whart. Cr. Law (9th ed.), § 33. Says Mr. Bishop, in discussing this subject: "There cannot be and there is not, in any locality or age, a law punishing men for what they cannot avoid." 1 Bish. Cr. Law (7th ed.), § 383b.

If therefore it be true, as matter of fact, that the disease of insanity can, in its action on the human brain through a shattered nervous organization, or in any other mode, so affect the mind as to subvert the freedom of the will, and thereby destroy the power of the victim to choose between the right and wrong, although he perceive it — by which we mean the power of volition to adhere in action to the right and abstain from the wrong — is such a one criminally responsible for an act done under the influence of such controlling disease? We clearly think not, and such we believe to be the just, reasonable and humane rule toward which all the modern authorities in this country, legislation in England and the laws of other civilized countries of the world are gradually but surely tending, as we shall further on attempt more fully to show. We next consider the question as to the probable existence of such a disease and the test of its presence in a given case.

It will not do for the courts to dogmatically deny the possible existence of such a disease, or its pathological and psychical effects, because this is a matter of evidence, not of law or judicial cognizance. Its existence and effect on the mind and the conduct of the patient is a question of fact to be proved, just as much as the possible existence of cholera or yellow fever formerly was before these diseases became the subjects of common knowledge, or the effects of delirium from fever, or intoxication from opium and alcoholic stimulants would be. The courts could, with just as much propriety, years ago, have denied the existence of the Copernican system of the universe, the efficacy of steam and electricity as a motive power, or the possibility of communication in a few moments between the continents of Europe and America by the magnetic telegraph, or that of the instantaneous transmission of the human voice from one distant city to another by the use of the telephone. These are scientific facts, first discovered by experts before becoming matters of common knowledge. So in like manner, must be every other unknown scientific fact in whatever profession or department of

knowledge. The existence of such a cerebral disease, as that which we have described, is earnestly alleged by the superintendents of insane hospitals, and other experts, who constantly have experimental dealings with the insane, and they are permitted every day to so testify before juries. The truth of their testimony, or what is the same thing, the existence or non-existence of such a disease of the mind, in each particular case, is necessarily a matter for the determination of the jury from the evidence.

So it is equally obvious that the courts cannot, upon any sound principle, undertake to say what are the invariable or infallible tests of such disease. The attempt has been repeatedly made, and has proved a confessed failure in practice. "Such a test," says Mr. Bishop, "has never been found, not because those who have searched for it have not been able and diligent, but because it does not exist." 1 Bish. Crim. Law (7th ed.), § 381. In this conclusion, Dr. Ray, in his learned work on the medical jurisprudence of insanity, fully concurs. Ray's Med. Jur. Ins. 39. The symptoms and causes of insanity are so variable, and its pathology so complex, that no two cases may be just alike. "The fact of its existence," says Dr. Ray, "is never established by any single diagnostic symptom, but by the whole body of symptoms, no particular one of which is present in every case." Ray's Med. Jur. Ins., § 24. Its exciting causes being moral, psychical and physical, are the especial subjects of specialists' study. What effect may be exerted on the given patient by age, sex, occupation, the seasons, personal surroundings, hereditary transmission and other causes, is the subject of evidence based on investigation, diagnosis, observation and experiment. Peculiar opportunities, never before enjoyed in the history of our race, are offered in the present age for the ascertainment of these facts, by the establishment of asylums for the custody and treatment of the insane, which Christian benevolence and statesmanship have substituted for jails and gibbets. The testimony of these experts (differ as they may in many doubtful cases) would seem to be the best which can be obtained, however unsatisfactory it may be in some respects.

In the present state of our law, under the rule in *McNaghten's* case, we are confronted with this practical difficulty, which itself demonstrates the defects of the rule. The courts in effect charge the juries, as matter of law, that no such mental disease exists as that often testified to by medical writers, superintendents of insane hos-

pitals and other experts; that there can be as matter of scientific fact no cerebral defect, congenital or acquired, which destroys the patient's power of self-control (his liberty of will and action), provided only he retains a mental consciousness of right and wrong. The experts are immediately put under oath, and tell the juries just the contrary, as matter of evidence, asserting that no one of ordinary intelligence can spend an hour in the wards of an insane asylum without discovering such cases, and in fact that "the whole management of such asylums presupposes a knowledge of right and wrong on the part of their inmates." Guy & F. Foren. Med. 220. The result in practice, we repeat is, that the courts charge one way and the jury, following an alleged higher law of humanity, find another in harmony with the evidence.

In Bucknill on Criminal Lunacy, page 59, it is asserted as "the result of observation and experience, that in all lunatics, and in the most degraded idiots, whenever manifestations of any mental action can be educed, the feeling of right and wrong may be proved to exist."

"With regard to this test," says Dr. Russell Reynolds, in his work on *The Scientific Value of the Legal Tests of Insanity*, p. 34 (London, 1872), "I may say, and most emphatically, that it is utterly untrustworthy, because untrue to the obvious facts of nature."

In the learned treatise of Drs. Bucknill and Tuke on "*Psychological Medicine*," p. 269 (4th ed., London, 1879), the legal tests of responsibility are discussed, and the adherence of the courts to the right and wrong test is deplored as unfortunate, the true principle being stated to be "whether, in consequence of congenital defect or acquired disease, the power of self-control is absent altogether, or is so far wanting as to render the individual irresponsible." It is observed by the authors: "As has again and again been shown, the unconsciousness of right and wrong is one thing, and the powerlessness through cerebral defect or disease to do right is another. To confound them in an asylum would have the effect of transferring a considerable number of the inmates thence to the treadmill or the gallows."

Dr. Peter Bryce, superintendent of the Alabama Insane Asylum for more than a quarter century past, alluding to the moral and disciplinary treatment to which the insane inmates are subjected, observes: "They are dealt with in this institution, as far as it is

practicable to do so, as rational beings; and it seldom happens that we meet with an insane person who cannot be made to discern, to some feeble extent, his duties to himself and others, and his true relations to society." Sixteenth Annual Rep. Ala. Insane Hosp. (1876), p. 22; Biennial Rep. (1886), pp. 12-18.

Other distinguished writers on the medical jurisprudence of insanity have expressed like views, with comparative unanimity. And nowhere do we find the rule more emphatically condemned than by those who have the practical care and treatment of the insane in the various lunatic asylums of every civilized country. A notable instance is found in the following resolution unanimously passed at the annual meeting of the British Association of Medical Officers of Asylums and Hospitals for the Insane, held in London, July 14, 1864, where there were present fifty-four medical officers:

"*Resolved*, That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently in those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions." *Judicial Aspects of Ins.* (Ordronaux, 1877) 423-424.

These testimonials as to a scientific fact are recognized by intelligent men in the affairs of every-day business, and are constantly acted on by juries. They cannot be silently ignored by judges. Whether established or not, there is certainly respectable evidence tending to establish it, and this is all the courts can require.

Nor are the modern law writers silent in their disapproval of the alleged test under discussion. It meets with the criticism or condemnation of the most respectable and advanced in thought among them, the tendency being to incorporate in the legal rule of responsibility "not only the knowledge of good and evil, but the power to choose the one and refrain from the other." *Browne Med. Jur. of Insanity*, §§ 13 *et seq.*, § 18; *Ray Med. Jur.*, §§ 16-19; *Whart. & Stilles Med. Jur.*, § 59; 1 *Whart Cr. Law* (9th ed.), §§ 33, 43, 45; 1 *Bish. Cr. Law* (7th ed.), §§ 386 *et seq.*; *Judicial Aspects of Ins.* (Ordronaux) 419; 1 *Greenl. Ev.*, § 372; 1 *Steph. Hist. Cr. Law*, § 168; 4 *Am. Law Rev.* (1869-1870) 236 *et seq.*

The following practicable suggestion is made in the able treatise of Balfour Browne above alluded to: "In a case of alleged insanity,

then," he says. "if the individual suffering from enfeeblement of intellect, delusion or any other form of mental aberration, was looked upon as, to the extent of this delusion, under the influence of duress (the dire duress of disease), and in so far incapacitated to choose the good and eschew the evil, in so far, it seems to us," he continues, "would the requirements of the law be fulfilled; and in that way it would afford an opening, by the evidence of experts, for the proof of the amount of self-duress in each individual case, and thus alone can the criterion of law and the criterion of the inductive science of medical psychology be made to coincide." *Med. Jur. of Ins.* (Browne), § 18.

This, in our judgment, is the practical solution of the difficulty before us, as it preserves to the courts and the juries, respectively, a harmonious field for the full assertion of their time-honored functions.

So great, it may be added, are the embarrassments growing out of the old rule, as expounded by the judges in the House of English Lords, that in March, 1874, a bill was brought before the House of Commons, supposed to have been drafted by the learned counsel for the queen, Mr. Fitzjames Stephen, which introduced into the old rule the new element of an absence of the power of self-control, produced by diseases affecting the mind, and this proposed alteration of the law was cordially recommended by the late Chief Justice COCKBURN, his only objection being that the principle was proposed to be limited to the case of homicide. 1 *Whart. Cr. Law* (9th ed.), § 45, p. 66, note 1; *Browne Med. Jur. of Ins.*, § 10, note 1.

There are many well considered cases which support these views.

In the famous case of *Hadfield*, 27 *How. St. Tr.* 1282; 2 *Lawsou Cr. Def.* 201-215, who was indicted and tried for shooting the king, and who was defended by Mr. Erskine in an argument most able and eloquent, it clearly appeared that the accused understood the difference between right and wrong as applied to the particular act. Yet he labored under the delusion that he had constant intercourse with the Divine Creator; that the world was coming to an end, and that, like Christ, he must be sacrificed for its salvation. He was so much under the duress of the delusion that he "must be destroyed, but ought not to destroy himself," that he committed the act for the specific purpose of being arrested and executed. He was acquitted on being tried before Lord KENYON, and no one ever doubted justly so.

The case of *United States v. Lawrence*, 4 Cr. C. C. Rep. 518, tried in 1835, presented another instance of delusion, the prisoner supposing himself to be the king of England and of the United States as an appendage of England, and that General Jackson, then president, stood in his way in the enjoyment of the right. Acting under the duress of this delusion, the accused assaulted the president by attempting to shoot him with a pistol. He was, in five minutes, acquitted by the jury on the ground of insanity.

The case of the *United States v. Guiteau*, 10 Fed. Rep. 161; 2 Lawson Cr. Def. 162, is still fresh in contemporary recollection, and a mention of it can scarcely be omitted in the discussion of the subject of insanity. The accused was tried, sentenced and executed for the assassination of James A. Garfield, then president of the United States, which occurred in July, 1881. The accused himself testified that he was impelled to commit the act of killing by inspiration from the Almighty, in order, as he declared, "to unite the two factions of the republican party, and thereby save the government from going into the hands of the ex-rebels and their northern allies." There was evidence of various symptoms of mental unsoundness, and some evidence tending to prove such an alleged delusion, but there was also evidence to the contrary, strongly supported by the most distinguished experts, and looking to the conclusion that the accused entertained no such delusion, but that being a very eccentric and immoral man, he acted from moral obliquity, the morbid love of notoriety, and with the expressed hope that the faction of the republican party, in whose interest he professed to act, would intervene to protect him. The case was tried before the United States District Court for the District of Columbia, before Mr. Justice Cox, whose charge to the jury is replete with interest and learning. While he adopted the right and wrong test of insanity, he yet recognized the principle that if the accused in fact entertained an insane delusion, which was the product of the disease of insanity, and not of a malicious heart and vicious nature, and acted solely under the influence of such delusion, he could not be charged with entertaining a criminal intent. An insane delusion was defined to be "an unreasoning and incorrigible belief in the existence of facts, which are either impossible absolutely, or impossible under the circumstances of the individual," and no doubt the case was largely determined by the application of this definition by the jury. It must ever be a mere matter of specu-

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lation what influence may have been exerted upon him by the high personal and political significance of the deceased, as the chief magistrate of the government, or other peculiar surroundings of a partisan nature. The case in its facts is so peculiar as scarcely to serve the purpose of a useful precedent in the future.

We note other adjudged cases in this country, which support the modern rule for which we here contend, including one decided in England, as far back as 1840, often referred to by the text-writers. In *Rex v. Oxford*, 2 C. & P. 225, Lord DENMAN clearly had in mind this principle, when after observing that one may commit a crime and not be responsible, he used this significant language: "If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible." The accused in that case acted under the duress of a delusion of an insane character.

In *State v. Felter*, 35 Iowa, 68, the capacity to distinguish between right and wrong was held not to be a safe test of criminal responsibility in all cases, and it was accordingly decided, that if a person commit a homicide, knowing it to be wrong, but do so under the influence of an uncontrollable and irresistible impulse, arising not from natural passion, but from an insane condition of the mind, he is not criminally responsible. "If," said Chief Justice DILLON, "by the observation and concurrent testimony of medical men who make the study of insanity a specialty, it shall be definitely established to be true, that there is an unsound condition of the mind, that is, a diseased condition of the mind, in which though a person abstractly knows that a given act is wrong, he is yet by an insane impulse, that is, an impulse proceeding from a diseased intellect, irresistibly driven to commit it, the law must modify its ancient doctrines and recognize the truth, and give to this condition, when it is satisfactorily shown to exist, its exculpatory effect."

In *Hopp* v. People*, 31 Ill. 385; s. c., 83 Am. Dec. 231, which was an indictment for murder, the same rule was recognized in different words. It was there held, that if at the time of the killing, the defendant was not of sound mind, but affected with insanity, and such disease was the efficient cause of the act, operating to create an uncontrollable impulse so as to deprive the accused of the power of volition in the matter, and he would not have done the act but for the existence of such condition of mind, he ought to be acquitted.

In *Bradley v. State*, 31 Ind. 492, a like modification of the old rule was announced, the court observing: "Men under the influence of disease, may know the right, and yet be powerless to resist the wrong. The well-known exhibition of cunning by persons admitted to be insane, in the perpetration of an illegal act, would seem to indicate comprehension of its evil nature and legal consequences, and yet the power of self-control being lost from disease, there can be no legal responsibility."

In *Harris v. State*, 18 Tex. Ct. App. 287; 5 Am. Cr. Rep. 357, this rule was applied to the disease known as kleptomania, which was defined as a species of insanity producing an uncontrollable propensity to steal, and it was held, if clearly established by the evidence, to constitute a complete defense in a trial for theft.

State v. Pike, 49 N. H. 399; s. c., 6 Am. Rep. 533, was an indictment for murder, to which the plea of insanity was set up as a defense. It was held to be a question of fact for the jury to determine: (1) Whether there was such a mental disease as dipsomania, which is an irresistible craving for alcoholic liquors; and (2) Whether the act of killing was the product of such disease. One of the most instructive discussions on the law of insanity which can be found in legal literature, is the learned opinion of Mr. Justice DOB in that case. *Lawson Insanity*, 311-312; 2 *Lawson Cr. Def.* 311 *et seq.*

This ruling was followed by the same court in *State v. Jones*, 50 N. H. 369; s. c., 9 Am. Rep. 242, which was an indictment charging the defendant with murdering his wife. The evidence tended to show that the defendant was insane, and killed her under the delusive belief that she had been guilty of adultery with one French. The rule in *McNaghten's* case, was entirely repudiated, both on the subject of the right and wrong test, and that of delusions, and it was held that the defendant should be acquitted if he was at the time afflicted with a disease of the mind of such character as to take away the capacity to entertain a criminal intent, and that there could be no criminal intent imputed, if, as matter of fact, the evidence showed that the killing was the offspring or product of such disease.

Numerous other cases could be cited bearing on this particular phase of the law, and supporting the above views with more or less clearness of statement. That some of these cases adopt the extreme view, and recognize moral insanity as a defense to crime, and others

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adopt a measure of proof for the establishment of insanity more liberal to the defendant than our own rule, can neither lessen their weight as authority, nor destroy the force of their logic. Many of them go further on each of these points than this court has done, and are therefore stronger authorities than they would otherwise be in support of our views. *Kriel v. Com.*, 5 Bush. 362; *Smith v. Com.*, 1 Duv. 224; *Dejarnette v. Com.*, 75 Va. 867; *Coyle v. Com.*, 100 Penn. St. 573; s. c., 45 Am. Rep. 397; *Cunningham v. State*, 56 Miss. 269; s. c., 31 Am. Rep. 360; *Com. v. Rogers*, 7 Metc. 500; *State v. Johnson*, 40 Conn. 136; *Anderson v. State*, 43 Conn. 514, 525; *Buswell Ins.*, §§ 439 *et seq.*; *State v. McWhorter*, 46 Iowa, 88.

The law of Scotland is in accord with the English law on this subject, as might well be expected. The Criminal Code of Germany however contains the following provision, which is said to have been the formulated result of a very able discussion both by the physicians and lawyers of that country. "There is no criminal act when the actor at the time of the offense is in a state of unconsciousness, or morbid disturbance of the mind, through which the free determination of his will is excluded." 9 Encyc. Brit. (9th ed.) 112; citing Crim. Code of Germany (§ 51, R. G. B.).

The code of France provides: "There can be no crime or offense if the accused was in a state of madness at the time of the act." For some time the French tribunals were inclined to interpret this law in such a manner as to follow in substance the law of England. But that construction has been abandoned, and the modern view of the medical profession is now adopted in that country.

It is no satisfactory objection to say that the rule above announced by us is of difficult application. The rule in *McNaghten's* case, *supra*, is equally obnoxious to a like criticism. The difficulty does not lie in the rule, but is inherent in the subject of insanity itself. The practical trouble is for the courts to determine in what particular cases the party on trial is to be transferred from the category of sane to that of insane criminals—where, in other words, the border line of punishability is adjudged to be passed. But as has been said in reference to an every-day fact of nature, no one can say where twilight ends or begins, but there is ample distinction nevertheless between day and night. We think we can safely rely in this matter upon the intelligence of our juries, guided by the testimony of men who have practically made a study of the disease.

of insanity; and enlightened by a conscientious desire, on the one hand, to enforce the criminal laws of the land, and on the other, not to deal harshly with any unfortunate victim of a diseased mind, acting without the light of reason, or the power of volition.

Several rulings of the court, including especially the one given *ex mero motu*, and the one numbered five, were in conflict with this view, and for these errors the judgment must be reversed. The charges requested by defendant were all objectionable on various grounds. Some of them were imperfect statements of the rules above announced; some were argumentative, and others were misleading by reason of ignoring one or more of the essentials of criminal irresponsibility, as explained in the foregoing opinion.

It is almost needless to add that where one does not act under the duress of a diseased mind, or insane delusion, but from motives of anger, revenge or other passion, he cannot claim to be shielded from punishment for crime on the ground of insanity. Insanity proper, is more or less a mental derangement, coexisting often, it is true, with a disturbance of the emotions, affections and other moral powers. A mere moral, or emotional insanity, so-called, unconnected with disease of the mind, or irresistible impulse resulting from mere moral obliquity, or wicked propensities and habits, is not recognized as a defense to crime in our courts. 1 Whart. Cr. Law (9th ed.), § 46; *Boswell v. State*, 63 Ala. 307; s. c., 35 Am. Rep. 20; *Ford v. State*, 71 Ala. 385.

The charges refused by the court raise the question as to how far one acting under the influence of an insane delusion is to be exempted from criminal accountability. The evidence tended to show that one of the defendants, Mrs. Nancy J. Parsons, acted under the influence of an insane delusion that the deceased, whom she assisted in killing, possessed supernatural power to afflict her with disease and to take her life by some "supernatural trick;" that by means of such power the deceased had caused defendant to be in bad health for a long time, and that she acted under the belief that she was in great danger of the loss of her life from the conduct of deceased operating by means of such supernatural power.

The rule in *McNaghten's* case as decided by the English judges, and supposed to have been adopted by the court, is that the defense of insane delusion can be allowed to prevail in a criminal case only when the imaginary state of facts would, if real, justify or excuse the act; or in the language of the English judges themselves, the

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defendant "must be considered in the same situation as to responsibility, as if the facts with respect to which the delusion exists were real." *Boswell's case*, 63 Ala. 307. It is apparent from what we have said that this rule cannot be correct as applied to all cases of this nature, even limiting it as done by the English judges to cases where one "labors under partial delusion, and is not in other respects insane." *McNaghten's case*, 10 Cl. & Fin. 200; 2 Lawson's Cr. Def. 150. It holds a partially insane person as responsible as if he were entirely sane, and it ignores the possibility of crime being committed under the duress of an insane delusion, operating upon the human mind, the integrity of which is destroyed or impaired by disease, except perhaps in cases where the imaginary state of facts, if real, would excuse or justify the act done under their influence. Fields Med. Leg. Guide, 101-104; Guy & F. Forensic Med. 220. If the rule declared by the English judges be correct, it necessarily follows that the only possible instance of excusable homicide in cases of delusional insanity would be where the delusion, if real, would have been such as to create in the mind of a reasonable man, a just apprehension of imminent peril to life or limb. The personal fear or timid cowardice of the insane man, although created by disease acting through a prostrated nervous organization, would not excuse undue precipitation of action on his part. Nothing would justify assailing his supposed adversary except an overt act or demonstration on the part of the latter, such as, if the imaginary facts were real, would under like circumstances, have justified a man perfectly sane in shooting or killing. If he dare fail to reason on the supposed facts embodied in the delusion, as perfectly as a sane man could do on a like state of realities, he receives no mercy at the hands of the law. It exacts of him the last pound of flesh. It would follow also under this rule, that the partially insane man, afflicted with delusions, would no more be excusable than a sane man would be, if perchance it was by his fault the difficulty was provoked, whether by word or deed; or if, in fine, he may have been so negligent as not to have declined combat when he could do so safely without increasing his peril of life or limb. If this has been the law heretofore, it is time it should be so no longer. It is not only opposed to the known facts of modern medical science, but it is a hard and unjust rule to be applied to the unfortunate and providential victims of disease. It seems to be a little less than inhuman, and its strict enforcement

would probably transfer a large percentage of the inmates of our Insane Hospital from that institution to hard labor in the mines or the penitentiary. Its fallacy consists in the assumption that no other phase of delusion proceeding from a diseased brain, can so destroy the volition of an insane person as to render him powerless to do what he knows to be right, or to avoid doing what he may know to be wrong. This inquiry, as we have said, and here repeat, is a question of fact for the determination of the jury in each particular case. It is not a matter of law to be decided by the courts. We think it sufficient if the insane delusion — by which we mean the delusion proceeding from a diseased mind — sincerely exists at the time of committing the alleged crime, and the defendant believing it to be real, is so influenced by it as either to render him incapable of perceiving the true nature and quality of the act done, by reason of the depravation of the reasoning faculty, or so subverts his will as to destroy his free agency by rendering him powerless to resist by reason of the duress of disease. In such a case, in other words, there must exist either one of two conditions: (1) Such mental defect as to render the defendant unable to distinguish between right and wrong in relation to the particular act; or (2) The overmastering of defendant's will in consequence of the insane delusion under the influence of which he acts, produced by disease of the mind or brain. *Rex v. Hadfield*, 37 How. St. Tr. 1282; 2 Lawson Cr. Def. 201; *Roberts v. State*, 3 Ga. 310; *Com. v. Rogers*, 7 Metc. 500; s. c., 41 Am. Dec. 458; *State v. Windsor*, 5 Harr. 512; *Buswell Insan.*, §§ 434, 440; 4 Am. Law Rev. (1869, 1870) 236-252.

In conclusion of this branch of the subject, that we may not be misunderstood, we think it follows very clearly from what we have said, that the inquiries to be submitted to the jury then, in every criminal trial where the defense of insanity is interposed, are these:

1. Was the defendant at the time of the commission of the alleged crime, as matter of fact, afflicted with a disease of the mind, so as to be either idiotic or otherwise insane?

2. If such be the case, did he know right from wrong as applied to the particular act in question? If he did not have such knowledge, he is not legally responsible.

3. If he did have such knowledge, he may nevertheless not be legally responsible if the two following conditions concur: (1) If, by reason of the duress of such mental disease, he had so far lost

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the power to choose between the right and wrong, and to avoid doing the act in question, as that his free agency was at the time destroyed. (2) And if, at the same time, the alleged crime was so connected with such mental disease, in the relation of cause and effect, as to have been the product of it solely.

The rule announced in *Boswell's* case, 63 Ala. 308, *supra*, as stated in the fourth head-note, is in conflict with the foregoing conclusions, and to that extent is declared incorrect, and is not supported by the opinion in that case otherwise than by *dictum*.

We adhere however to the rule declared by this court in *Boswell's* case, *supra*, and followed in *Ford's* case, 71 Ala. 385, holding that when insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury, by a preponderance of the evidence; and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not authorize an acquittal.

There was no error in overruling the objection taken by the defendants to the copy of the *venire* or list of jurors, served on them. The act approved February 17, 1885 (Acts 1884-1885, pp. 181, 185, § 10), regulating the organization of juries, applies to this case, and provides that "the names of the jurors so drawn," in accordance with section 10 of the act, together with the panel of thirty-six jurors provided for by section 9, "shall constitute the *venire*," from which the jurors to try capital cases shall be selected. Acts 1884, 1885, pp. 185-186. The rule on this subject declared in *Posey's* case, 73 Ala. 490, and *Shelton's* case, 73 Ala. 5, has no application under this act. These cases construe section 4871 of the Code, which contains different language from the law here construed.

Under the rule announced in *Ford v. State*, 71 Ala. 385, 397, and authorities there cited, there was no error in excluding the proposed statement of Mrs. Nail. This testimony was defective in not being preceded more fully by the facts and circumstances upon which the opinion of the witness as to the sanity of the accused was predicated; the witness not being an expert. Rogers Expert Test., § 61.

The other rulings of the court need not be considered by us.

The judgment is reversed and the cause remanded. In the meanwhile the prisoners will be held in custody until discharged by due process of law.

STONE, C. J., dissents in part.

Reversed and remanded.

NOTE BY THE REPORTER.—The following is the dissenting opinion of STONE, C. J.: In *Boswell v. State*, 68 Ala. 307; s. c., 85 Am. Rep. 20, two material questions arose on the subject of insanity: First, whether or not when that defense is set up, its existence must be proved by the accused, what measure of proof is required to establish it, and whether it is enough if the testimony raises a reasonable doubt of the prisoner's sanity. We held it was defensive in its nature, and that the proof did not come up to the required standard, if it simply raised a reasonable doubt of its existence. As to the measure of proof, we applied the rule which obtains in civil cases, viz.: That which reasonably satisfies the mind of a jury of the fact sought to be established.

The second question presented and considered in that case was, whether moral insanity was an excuse for an act otherwise punishable. We declared it was not; and in the category we included homicidal mania, irresistible impulse, and every other species of simply moral obliquity, provided the mental faculties were not shown to be unsound. Each of these principles was reaffirmed in *Ford v. State*, 71 Ala. 385.

The most important inquiry in *Boswell's* case—the one chiefly relied on for reversal—was the first stated above; the *onus* and measure of proof. The testimony scarcely raised any other. Our own decisions had left that question in deplorable uncertainty, as we attempted to show. The English authorities, particularly the older ones, had given way to a more enlightened understanding of mental disorders. It was on that question, namely, the presumption of sanity, and the burden and manner of overcoming that presumption, that the opinion of the judges in the *McNaghten* case was quoted and relied on. All the judges except MAULE had concurred in advising the House of Lords “that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their (the jury's) satisfaction.” To this extent the advice of the judges was pertinent to *Boswell's* case, and for this purpose it was used. Beyond this the cases were unlike. *McNaghten's* mental malady was presented to the judges as one of “mental delusion.” Their answers were given on the postulate that his mental disease was “partial delusion only,” and that he was not “in other respects insane.” Hence we said *Boswell's* case: “It must not be overlooked that the judges were considering a case of partial insanity; the case of a person afflicted with insane delusion in respect to one or more particular subjects or persons.” On the other hand, in *Boswell's* case, there was no pretense of mental delusion. What we said on that question was simply a statement and citation of authorities, supporting and following the views of the judges, given in the *McNaghten* case. Its correctness or incorrectness was not material to a correct solution of the questions we were discussing; and while the principle was quoted without dissent, there was nothing to cause us to inquire into or question its correctness. Our attention was not directed to the tests of criminal accountability, except to that phrase of it which is classed as moral insanity; and which we explicitly declared was no defense to a prosecution for crime. I do not feel committed, by any thing said in *Boswell's* case, to any proposition beyond the two principles stated above.

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I summarize my views of the questions I propose to discuss, in the following brief paragraphs:

1. Insanity, when relied on as a defense to a prosecution for crime, is a mixed question of law and fact.

2. It is a perfect defense to an accusation of crime, if the accused, at the time he committed the act, was afflicted with a mental disease to such extent, as to render him incapable of determining between right and wrong, or of perceiving the true nature and quality of the act done.

3. When it is satisfactorily shown that the accused was mentally diseased at the time he did the act charged as an offense, and that he did the act in consequence solely of such mental disease, without which it would not have been done, this is a complete defense, even though the defendant knew the act was wrong.

4. When at the time of committing the act charged, the defendant was laboring under a disease of the mind, known as delusion, illusion, or hallucination, and the act done was solely the result of such mental disease, connected with and growing out of it as effect follows cause, and without which the act would not have been done, the defendant should be acquitted on the plea of insanity. Whart. Cr. Ev., § 336; 2 Greenl. Ev., § 372.

5. No form of moral or emotional insanity is a defense against a criminal accusation.

I have considered the very able opinion of my brother SOMERVILLE with great care, and I differ from what I understand to be its declared principles only to a limited extent, to be commented upon further on. I have also read the legal authorities he relies on, but have not read, on this subject, the other authorities he refers to. Some of them, I fear, deal too much in the abstruse and metaphysical—refine too much—to become safe guides in judicial administration. Legal principles, when enunciated for the government of juries, should, if possible, be expressed so simply and clearly as to be easily understood by the class of men who generally perform that service. Less than this is not properly instructing juries on questions of law, pertinent to the issues they are sworn to try.

I differ with my brother SOMERVILLE in the interpretation of some of the legal authorities he relies on as supporting his views, and as to others, in the estimate he places upon them as authority. This court has repudiated the doctrine of moral insanity as a defense for conduct otherwise criminal; and we hold that insanity is a defense to be affirmatively established by proof. It is not enough that a reasonable doubt of sanity is engendered. *Bonwell's case*, 63 Ala. 307; s. c., 35 Am. Rep. 20; *Ford's case*, 71 Ala. 385. Of the judicial authorities relied on by him, the following cases hold that the defense of insanity is made good, if the testimony raises a reasonable doubt of its existence. Some of them go so far as to hold that when any evidence of insanity is produced, the burden is then cast on the prosecution to establish sanity beyond a reasonable doubt. *State v. Jones*, 50 N. H. 389; s. c., 9 Am. Rep. 242; *Bradley v. State*, 31 Ind. 492; *Hopps v. People*, 31 Ill. 385; *Cunningham v. State*, 56 Miss. 269; s. c., 31 Am. Rep. 360; *State v. Johnson*, 40 Conn. 136.

In the opinion of my brother SOMERVILLE, the case of *Feller*, 25 Iowa, 68, is given a prominent place. The opinion in that case was prepared by the justly

distinguished law writer and jurist, Chief Justice DILLON. The decision was in 1868. In considering the weight of that opinion, I remark, first, that it was pronounced by a court which holds that moral insanity is a defense to a criminal prosecution. Many of the expressions found in that opinion, and in the opinions of other courts, entertaining similar views, are well chosen to express moral insanity and its workings. They are misleading, if not inappropriate, when used in description of intellectual unsoundness, or mental insanity. The defense relied on in that case was homicidal mania, the existence of which as mental disease, DILLON, C. J., says, "both medicine and law now recognize." Yet in that case, the distinguished judge said: "If this want of power of control arose from the insane condition of the mind of the accused, he should not be held responsible. But if want of power to control his actions arose from violent and ungovernable passions, in a mind not deceased or unsound, he would and ought to be punished for his acts." In *McWhorter's* case, 46 Iowa, 88, decided in 1877, the following charge had been requested in behalf of the prisoner: "If the jury believe from the evidence that at the time of the commission of the alleged homicide the defendant was laboring under a diseased condition of the mind, that he was insane on the subject of the manner in which the deceased (a physician) had treated his wife, and on the subject of deceased, with others, having formed a conspiracy to take his (defendant's) life, then the jury should acquit the defendant." This charge the trial court had refused to give. The Supreme Court, in reference to it, said: "It will be at once observed that this instruction fails to present the condition, that the mental disease must have destroyed the power of defendant to comprehend rationally the nature and consequences of his act and overpowered his will, which must exist in order to render him free from accountability for his acts." *Fetter's* case is cited in support of this principle. In the still later case, *State v. Hockett*, 80 N. W. Rep. 742, the Supreme Court of Iowa expressed the principle as follows: "On the trial of an indictment for murder, where insanity is pleaded, an instruction to the jury that 'the alleged insanity and the alleged crime must be connected, the one with the other; and the latter be the offspring of the former, in order to have the effect of rightfully declaring one irresponsible for his acts,' is correct, where there is no evidence tending to show that the defendant was insane on all subjects, or was homicidally insane.

The case of *Hopps v. People*, 81 Ill. 335; s. c., 88 Am. Dec. 231, is the next case relied on. The opinion in that case was by Judge BREESE. The alleged insanity was in the form of mental illusion, as to his wife's infidelity to him. Speaking for the court, Judge BREESE said: "We have come to the conclusion that a safe and reasonable test, in all such cases, would be, that whenever it shall appear from the evidence that at the time of doing the act charged the prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind, or affection of insanity, must be of such a degree as to create an uncontrollable impulse to do the act charged, by overruling the reason and judgment, and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them." Let it be borne

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in mind that this summation of the principle was the utterance of a court which held that moral insanity precluded criminal accountability; and yet to make the defense available, it was held necessary that the mental unsoundness should have so far progressed, as to "obliterate the sense of right and wrong as to the particular act done."

That I am correct in my interpretation of the court's decision, I refer to the ruling of the same court, made in *Dunn v. People*, 109 Ill. 685, decided in 1884. In that case the trial court had charged the jury, as follows: "If you believe from the evidence, beyond a reasonable doubt, that at the time of committing the alleged act the defendant was able to distinguish right from wrong, then you cannot acquit him on the ground of insanity. Two other charges were given, embodying the same thought, but expressed more in detail. In the opinion of the court is this language: "It is claimed that these instructions conflict with the law as declared in *Hopps v. People*, 81 Ill. 385, and *Chase v. People*, 40 Ill. 853. We do not so understand the instructions. In the *Hopps* case, in discussing the question of insanity, it said," etc. The court then proceeds to repeat that part of the opinion which I have copied above. It was added: "If at the time the crime was committed the defendant knew that it was wrong to commit such a crime, and had the power of mind to choose either to do or not to do that act, and of controlling his conduct in accordance with such choice, then he ought to be held responsible, although he was not entirely and perfectly sane. * * * Where a man knows that it is wrong to do a certain act, and possesses the power of mind to do or not to do that act, it would be a dangerous doctrine to hold that such person should not be held responsible, because he might not be regarded entirely and perfectly sane."

The case of *Bradley v. State*, 81 Ind. 492, comes next in order. The opinion in that case, which was pronounced in 1869, shows that the writer had read considerably on the subject of mental disorders. Viewed from the standpoint that like the cases we have cited, that opinion was delivered by a court which holds that moral insanity is a defense to a criminal charge, and that if a reasonable doubt of sanity is engendered, an acquittal must follow, there is nothing remarkable in that case, except that it expresses disapprobation of the simply right and wrong test.

In *Walker v. State*, 102 Ind. 502, decided in 1885, the Supreme Court of that State again considered the question of insanity as a defense for crime. The trial court had charged the jury that, "only persons of sound mind in law can be convicted of crime." * * * When considered (insanity) in relation to crime, it is a general rule that persons, who are in that relation which the law recognizes as of unsound mind, are not responsible criminally for their acts when in that condition. But it is also true that mere weakness of mind alone, or slight mental ailments which do not exclude that knowledge of right and wrong, and the power to act in accordance with the plain dictates of reason and justice, do not constitute unsoundness of mind in the law. * * * In cases of partial insanity, when the mind may be clouded and weakened, but not remembering, reasoning, and judging, or so perverted by insane delusions as to act under false impressions or influences — in these cases the rule is this: A man is not to be excused from responsibility if he has capacity and

reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing, (to have) a knowledge and consciousness that the act he is then doing is criminal and wrong, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relations in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others and in violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act, and its consequences, if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. He is then not insane. The true test is this: Has the defendant in a criminal case the power to distinguish right from wrong and the power to adhere to the right and avoid the wrong? Has the defendant, in addition to this, the power to govern his mind, his body and his estate? If he has these powers he must exercise them. He is then in law not a person of unsound mind, and the law will hold him answerable for his acts. But if his mind be so unsound that he has them not, then the law will excuse his act by reason of the unsoundness of his mind."

Speaking of the ruling on these charges, and another not material to the inquiry before us, the revising court said, "considered as a whole * * * it contains nothing materially injurious to the appellant."

The case of *Harris v. State*, 18 Tex. Ct. App. 287, presented the question of moral insanity — kleptomania — held a valid defense by that court. There was nothing decided material to the question we have in hand.

Smith v. Commonwealth, 1 Duv. 224, declares two propositions: First, that moral insanity is a defense to a prosecution for crime. The insanity relied on was that the prisoner, when he perpetrated the homicide, was drunk, and that "such a condition superinduced moral insanity." The second proposition of the opinion was that a reasonable doubt of the prisoner's sanity justified an acquittal. This case was decided in 1864.

In the later case of *Kriel v. Commonwealth*, 5 Bush. 862, the defense of reasonable doubt of sanity was expressly held insufficient. In the opinion is the following clause: "If there be mental or moral insanity, however recent, to such an extent as to destroy free agency and moral responsibility, on being established by satisfactory evidence, this will excuse." In the same opinion, after stating that drunkenness may be of such a character and to such a degree as to repel all idea of malice, and to reduce a homicide from murder to manslaughter, it is added: "But as this state of mind is superinduced by the wrongful act of the perpetrator, a due regard for the interest of society and the personal security of every one, precludes it from being a satisfactory excuse, and an entire exemption from punishment. Indeed, if it appeared that intoxication excited the animal passions and aroused a destructive propensity in the accused, why should even drunkenness in such a case be considered a mitigating cause, any more than the unchaining a mad dog in the

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streets of a town, or the riding a vicious animal into a crowd, merely because the perpetrator had no particular malice at any one, or indeed expected death at all to ensue; yet if by reason thereof, any one should lose his life, this recklessness is set down as malice toward mankind in general, and the perpetrator criminally responsible in the highest degree?"

The case of *Cunningham v. State*, 56 Miss. 269; s. c., 81 Am. Rep., 360, declares principles which I am unable fully to reconcile. It first allows a reasonable doubt of sanity, engendered by the evidence, to be a defense against a charge of crime, but declares that the burden of proving insanity is on the defendant. It next adopts the right and wrong theory, or capacity to perceive the difference between right and wrong as the test of insanity. It then adopts the rule declared by the judges in the *McNaghten* case as applicable to cases of mental delusion. The views of Justice CHALMERS in the latter part of his opinion rendered in this case, I reproduce entire. The court below had been requested to instruct the jury that "there is no responsibility for an act committed under the uncontrollable impulse resulting from mental disease." On this clause of the charge, the court expresses itself as follows:

"The second clause declares that there is no responsibility for 'an act committed under the uncontrollable impulse resulting from mental disease.' If the impulse meant is the direct result of such mental disease as destroys the perception of right and wrong, this is only a re-affirmation of the doctrine announced in several preceding charges, and it derives no additional strength from the prefix of the word 'uncontrollable.' But there is said to be an uncontrollable impulse springing from a mental condition quite different from this—a state of the mind which perfectly perceives the true relations of the party, and recognizes all the obligations thereby imposed, but which is unable to control the will.

"This character of insanity is variously styled moral, or emotional, or impulsive, or paroxysmal insanity. It is known among medical writers as lesion of the will. Its peculiarity is said to be that while the mental perception is unimpaired, the mind is powerless to control the will; that while its unhappy subject knows the right, and desires to pursue it, some mysterious and uncontrollable impulse compels him to commit the wrong. This kind of insanity, if insanity it can be called, though sometimes recognized by respectable courts, and still oftener, perhaps, by juries seeking an excuse to evade the stern dictates of the law, is properly rejected by the authorities generally. The possibility of the existence of such a mental condition is too doubtful, the theory is too problematical, and too incapable of a practical solution, to afford a safe basis of legal adjudication. It may serve as a metaphysical or psychological problem, to interest and amuse the speculative philosopher, but it must be discarded by the jurist and the law-giver in the practical affairs of life. To it may well be applied the language of Judge CURTIS, who, in speaking of this and similar questions, says: 'They are an important, as well as a deeply interesting study, and they find their place in that science which ministers to diseases of the mind. * * * But the law is not a medical nor a metaphysical science. Its search is after those practical rules which may be administered without inhumanity, for the security of civil society by protecting it from

crime. And therefore it inquires, not into the peculiar constitution of mind of the accused, or what weakness, or even disorders, he was afflicted with, but solely whether he was capable of having, and did have, a criminal intent. If he had, it punishes him; if not, it holds him dispensable.' *United States v. McGehee*, 1 Curt. 1.

"The latter clause of the instruction in question is copied — as, indeed, the whole instruction is — from the syllabus, or head-notes, of *Commonwealth v. Rogers*, 7 Metc. 500, but it fails to embody the qualification and restriction thrown around the doctrine in the opinion itself."

"The uncontrollable impulse, which the learned chief justice declares will excuse the act, is said to be, that which overwhelms reason, conscience and judgment.' 'If so,' says he, 'then the act was not the act of a voluntary agent, but the involuntary act of the body, without the concurrence of the mind directing it.' In other words, it is the uncontrollable act of a mind destitute of reason, conscience or judgment as to the particular object, however sane as to other matters. The latter clause of the instruction therefore should have been restricted by words conveying the idea that the act was the direct result of an uncontrollable impulse, springing from mental disease, existing to so high a degree, that for the time it overwhelmed the reason, judgment and conscience."

In *Com. v. Rogers*, 7 Metc. 500, a case tried before SHAW, C. J., the defense was rested on mental delusion. The sum of the instructions is contained in the following extract:

"The questions then in the present case, will be these: 1. Was there such a delusion and hallucination? 2. Did the accused act under a false but sincere belief that the warden had a design to shut him up, and under that pretext, destroy his life; and did he take this means to prevent it? 3. Are the facts of such a character, taken in connection with the opinions of the professional witnesses, as to induce the jury to believe that the accused had been laboring for several days under monomania, attended with delusion; and did this indicate such a diseased state of the mind, that the act of killing the warden was to be considered as an outbreak or paroxysm of disease, which for the time being overwhelmed and superseded reason and judgment, so that the accused was not an accountable agent?"

"If such was the case, the accused is entitled to an acquittal; otherwise, as the evidence proves beyond all doubt the fact of killing, without provocation, by the use of a deadly weapon, and attended with circumstances of violence, cruelty and barbarity, he must undoubtedly be convicted of wilful murder."

In the case of *Djarnette v. Com.*, 75 Va. 867, the principle declared is embodied in the following extract from the opinion: "In every case, although the accused may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences, and has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, and possesses withal a will sufficient to restrain the impulse that may arise from a diseased mind, such partial insanity is not sufficient to exempt him from responsibility to the law for his crimes." This court recognized moral insanity as a defense.

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So, in Pennsylvania, the court receives the defense of moral insanity as an answer to a criminal accusation. In *Boswell's* case we commented on C. J. GIBSON's language, as used in *Com. v. Mosler*, 4 Barr, 264, and disapproved it. In *Coyle v. Com.*, 100 Penn. St. 573; s. c., 45 Am. Rep. 397, decided in 1882, the trial court had repeated to the jury the language of C. J. GIBSON, which we copied in *Boswell's* case. This was urged as a ground of reversal in the Supreme Court. In reply, the court said:

"The able argument of counsel has failed to convince us that this was not a correct declaration of the law, or that it has since been ruled otherwise by this court. The validity of such a defense is admitted, but the existence of such a form of mania must not be assumed without satisfactory proof. Care must be taken not to confound it with acts of reckless frenzy. When interposed as a defense to the commission of a high crime, its existence should be clearly manifested. Such defense is based on an unsound state or condition of the mind, proved by acts and declarations of violence. It certainly is not requiring too much to hold that it shall be shown in more than a single instance. We know no later case in this State where the precise question has been ruled otherwise." Nothing else is said in that case which is material to the subject I am considering, except that the court repudiates the right of acquittal, if the testimony simply raises a reasonable doubt of sanity. The insanity relied on in that case was homicidal mania; a so-called form of insanity which this court declines to recognize as a mental disease.

The Connecticut cases need but a passing notice. *State v. Johnson*, 40 Conn. 136, presented the defense of dipsomania. In that case they not only permitted the defense of moral insanity, but when insanity was the defense, the State was at that time required to prove sanity beyond a reasonable doubt. A discussion of the questions there considered would present no new features.

The case of *Anderson v. State*, 43 Conn. 514, scarcely raises a question material to the line of thought I am pursuing. The majority of the revising court—three to two—granted petitioner a new trial, rather against legal rules, because in their judgment he had not had his case fully and sufficiently represented in the court below. The profession on reading it would not esteem it a safe or valuable precedent.

In the later case of *State v. Hoyt*, 46 Conn. 330, that court qualified its rulings by holding that proof of the insanity of a person accused of crime is a matter of defense wholly, and the burden of proving it rests on the accused.

The case of *State v. Pike*, 49 N. H. 399; s. c., 6 Am. Rep. 533, was decided in 1870. The defense relied on was dipsomania—an inordinate craving of alcoholic stimulants. The defendant was convicted of murder in the first degree. The chief questions discussed on error arose on the refusal of the court to give the following instruction to the jury:

"The defendant requested the court to instruct the jury that the sanity—the mental capacity of the defendant to commit any crime charged in the indictment—is a fact to be proved by the State beyond all reasonable doubt; that there is no legal presumption of sanity, which can have any weight with the jury as a matter of law; that there is no legal presumption of sanity which

is a substitute for evidence, or which, as a matter of law, affects the burden of proof in criminal cases."

An offer had been made, in the court below, to prove, by non-expert witnesses, their naked opinion that the accused was insane when he committed the homicide. This testimony had been rejected, and it was claimed that in this ruling there was error.

The majority opinion of the court was delivered by SMITH, J., affirming the judgment, in which all the justices, except Justice DOR, appeared to have concurred. Then follows a most elaborate opinion by Justice DOR, which I can but regard as a dissenting opinion, although not so expressed in the book. It covers thirty-six pages, discloses much thought, reading and research, and is expressed in a bright, incisive, combative style. He first devoted many pages to prove that all witnesses—non-experts as well as experts—should be allowed alike to testify to their opinions of a prisoner's insanity. In this he opposes the views of his brother justices, and he stands opposed to our uniform rulings, which I need not cite. He also declared, in terms, that "There was error in the refusal of the court to instruct the jury that there is no legal presumption of sanity; and also in the instruction that every person of mature age is presumed to be sane until there is evidence tending to show insanity." In this he also stood opposed to his brother judges. He did more. He antagonized every authority I have ever seen or heard of on the subject. And as I understand his position, he took the ground that there are no legal tests on the subject of sanity or insanity; that the judges can give no directions for determining such issue, and that it is solely and purely a question of fact, to be determined by the jury, on the sworn testimony before them. The presiding judge must give no instructions or directions as to the constituents or classifications of mental disorders, nor as to the dividing line which separates accountable sanity from irresponsible insanity. To allow him to do so would be to receive unsworn testimony from a non-expert witness. The result of this is that the judge must sit quietly by in his supposed ignorance, as a silent looker on, while the forensic battle is waged between opposing counsel, with their expert, opinion testimony, before the jury, as the sole triers and arbiters of the facts. Who is to determine the pertinency of the evidence offered? Not the presiding judge, for not knowing what constitutes insanity, he cannot know what facts and circumstances tend to prove its existence. Can there be judicial administration without a presiding umpire to determine the disputes of opposing litigants? As well put a locomotive engine in motion without an engineer, or launch a ship without a pilot or rudder.

The error of Judge DOR's position, as I understand it, and in fact, of the whole New Hampshire court, lies in the assumption that the question of sanity or insanity is one purely of fact. I admit it is largely so; but no question of judicial contestation can ever become solely a question of fact. Law pervades every human transaction, every question of status, every inquiry of right and wrong, as vital force pervades every fibre, every corpuscle of the living animal. The legal element may be agreed between the contestants, and hence may not be visible. Still it is there, and defines and determines what the issue is, and how the suit is to be maintained or defeated.

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It is my opinion that the inquiry of insanity, like most others in judicial administration, is a mixed question of law and fact. Of law, as to the extent and measure of mental disorder, which absolves from legal accountability. Of law, necessarily, in determining the pertinency of testimony offered in proof or disproof of the alleged mental disorder. Like most, if not all other courts, whose utterances on these questions have fallen under my observation, this court stands unmistakably committed to this doctrine. Hence, we have held that what is called emotional or moral insanity is not a disease or the intellect, but sheer depravity — a surrender of the higher teachings of conscience to baser and debased passions, instincts, and appetites. This we held, the intellectual faculties remaining sound, is no defense to a criminal accusation. Hence we have held (and I understand my brothers as asserting it in this case) that to excuse conduct otherwise criminal, on the plea of insanity, the mind proper, as distinguished from the emotions, must be diseased, and the act charged must have been connected with that disease, as effect with cause. Hence we have held, and so decide in this case, that on the trial of such issue in the primary court, the presiding judge is within proper bounds, when he determines what testimony is and what is not pertinent to the issue.

It will have been observed that the cases I have collated and considered were decisions made by courts which hold that moral insanity is a defense to a criminal prosecution. I think this fact should be considered in weighing their value as authority. The phrases "sudden impulse" and "overpowering or subverting the will" are frequently encountered in the opinions delivered in those cases. Impulse is emotional rather than intellectual. It is a sudden emotional influence brought to bear on the will as an intellectual faculty, and as a rule, not the offspring of the reasoning faculties. It is rather the antithesis of a formed judgment. It differs from the cognitive or knowing faculty, and not infrequently so dominates the latter, as to acquire, for the time, the mastery of the will. The will, the executive faculty of the mind, cannot, with propriety, be said to be subverted. To be subverted or overturned is to cease to have purpose — to cease to act; for without the function of the will there can be no physical action. The will retains all its power, but for the time, ceases to act in harmony with the knowledge-possessing faculty. It is perverted, but not subverted. I am speaking in common parlance, and employing language in its proper sense. When the will is perverted by a disease of the brain, or intellectual faculties, then any act caused thereby is blameless in the sight of the law. On the other hand, if there be no disease of the intellectual faculties, and the act done, though by a very perverted will, is nevertheless the offspring of moral depravity, debauched appetite, blunted sense of right, or other kindred prompting of a wicked heart, then for such an act there is a moral and legal accountability in the amplest sense of those terms. The murderer, the assassin, the burglar, the incendiary, can truthfully plead that their wills have ceased to be the executors of their intellectual promptings. Criminal passion or appetite has obtained mastery over their higher and purer intellectual endowments, and perverted their wills to its baser uses.

I have indulged in these reflections, because I think the expressions "sudden impulse" and "subversion of the will" are inaccurate and misleading; at least, under our jurisprudence.

Keeping myself reasonably abreast with advanced thought, and with the later and better understanding of mental disorders, I am willing to disclaim, as untenable, one of the tests of legal accountability declared by the judges in the *McNaghten* case. That was a case of partial insanity, called "mental delusion." There can be no difference, in a legal point of view, between delusion, illusion, and hallucination. In that case it was said that the delusion would be a defense, only when the supposed facts, if real, would have justified the act done. This rule is too exacting. At the head of this opinion I have presented my views of the questions discussed in the form of *syllabi*.

In the present case the wife and daughter were tried and convicted of the murder of the husband and father. The homicide was perpetrated with a gun, in the hands of the daughter, at the alleged instigation of the wife. The defense interposed for the daughter was idiocy. The wife's defense was insanity, in the form of mental delusion. The delusion or hallucination was her alleged belief in a supernatural power and influence the husband had and exercised over her, by which he could bring sickness and even death upon her. That by the exercise of this power he had brought on her protracted sickness, and she feared and believed he would ultimately destroy her life. Of course, this fear and belief could only be gathered from her own conduct and expressions of belief and fear.

If this delusion proceeded from mental disorder, or defective mental organization, it is questionable if the case does not fall directly within the rule declared in the *McNaghten* case. If the wife believed her husband possessed supernatural power over her, by which through unseen influences, he could bring upon her disease, and even death; that he had exerted that power, and caused her to be sick for a great length of time, and she believed, intended ultimately to take her life, in what manner could she rid herself of such impending peril? She could not flee away from it, if she would; for the power being supernatural, it could pursue her whithersoever she fled. Supposing her delusion to be a fact, how could she save her own life, by any preventive measures short of taking his?

Was her alleged delusion insanity? Was it, if it existed, a disease of the reasoning faculty? What say psychological experts on this subject? It is believed that the delusion claimed for her is a very common superstition with the grossly ignorant, particularly among the colored population. Less than three centuries ago the whole English-speaking people labored under this delusion, or superstition, and called it witchcraft. So firmly did they believe it, that they made the practice of it a capital felony. Many unfortunates to whom this dark art was imputed, paid the penalty by the most torturing of all known methods of inflicting the death sentence. Were our ancestors, from the king on his throne to the laboring peasant, all insane? Even the great and good Sir Matthew Hale was a believer in witchcraft. He said, "that there were such creatures as witches he made no doubt at all; for first, the Scriptures had affirmed so much. Secondly, the wisdom of all nations had provided

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laws against such persons, which is an argument of their confidence of such crime."

On the other hand, if the great, the noble, and the learned, two or three centuries ago, slaughtered men and women indiscriminately as the imputed possessors of this demoniacal power, and under all the forms of law and for the public welfare, is it right to make an example of one ignorant, superstitious woman, if she destroyed one life as the only means, to her benighted vision, of saving her own? Of course this is stated on the hypothesis that she really believed her husband possessed, and was exercising this dangerous power.

Let us pursue this line of thought a little further. In the world are very many religious faiths, each, perhaps, asserting a divine or supernatural inspiration. Take three of the most prominent, the Christian, the Mohammedan and the Buddhist; each numbering its adherents by the hundred millions. With each of these faiths the professions of the other two are mere superstitions or hallucinations. Are the invocations to Allah and to the "Enlightened One" any more an illusion to our comprehension than Christian worship is to theirs? Our faith, we maintain, is founded alike on Divine revelation and the inherent evidences of its purity and truth. Is their mental delusion a species of partial insanity? And if the zeal of the religion of Mohammed, propagation by the sword is believed to be a duty, is such act to be excused on the score of mental illusion? What of the believers in spiritualistic materialisations, mind-reading, and the many other isms which live their brief day, and are not without a following? Are the believers in such supernatural powers mentally diseased? Such inquiries may be amusing, if not interesting, to the visionary and speculative. They can only bewilder when applied to the actual transactions of business life. Judicial administration is too real to enter upon such doubtful and dangerous speculations. In the language of Judge CURTIS, "It searches after those practical rules which may be administered without inhumanity, for the security of civil society by protecting it from crime. It inquires not into the peculiar constitution of mind of the accused, or what weakness, or even disorders he was afflicted with, but solely whether he was capable of having, and did have a criminal intent." I hold we should take our steps cautiously, in adopting the theories of psychological enthusiasts, lest we disarm retributive justice of all its restraining energy.

This is a dissenting opinion, and I wish to be understood as intimating no opinion, either one way or the another, on the sufficiency or insufficiency of the asserted insanity, relied on in this case. It being, under the opinion of my brothers, a question of fact for the jury, I will leave it to them, without any attempt to bias them by any thing I may say.

I regret the necessity I have felt resting on me of differing with my brothers in this case. I regret what I conceived to be a duty to express my views so much at length. On a question of less importance I would not have done so. I have feared, however, and still fear, that the effect of their ruling will be to let in many of the evils which result from allowing the defense of emotional insanity. I acquit them of all intention to alter the rule of this court on that subject. Still, I think the line cannot be too clearly and sharply drawn, which

separates the pitiable, unfortunate victims of diseased mental facilities, from the recklessly depraved, whose chief evidence of insanity is found in the causeless atrocity of their crimes. Human life has become all too cheap; and while we spread the mantle of mercy over the criminally irresponsible, the lawless should be made to feel that the way of the transgressor is hard. The terror of the law may thus become a minister of peace.

In addition to this Alabama case, this question has been passed upon by the Kansas Supreme Court, in *State v. Mowry*, Oct. 8, 1887. An abstract is as follows: The defendant interposed the defense of insanity to the charge of murder in the first degree, and on the trial the court charged substantially, that the test of the defendant's responsibility was whether, at the time of the homicide, he had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he was doing, and had power to know that the act was wrong and criminal, and would subject him to punishment. *Held*, that it was a proper instruction; and further, *held*, that the omission to charge, that if the defendant knew the act to be wrong, but was driven to it by an irresistible impulse arising from an insane delusion, he would not be responsible, was not error. The "right and wrong test" was approved by this court in *State v. Nixon*, 33 Kana. 205. It was there said that "where a person at the time of the commission of an alleged crime has sufficient mental capacity to understand the nature and quality of the particular act or acts constituting the crime, and the mental capacity to know whether they are right or wrong, he is generally responsible if he commits such act or acts, whatever may be his capacity in other particulars; but if he does not possess this degree of capacity, then he is not so responsible." This test has received the almost universal sanction of the courts of this country. Lawson Insan. 281-270. The defendant urges that the instruction is erroneous, because it excluded the theory of an irresistible impulse or moral insanity. This question received the attention of the court, and was practically decided in *State v. Nixon*, *supra*, although the question was not fairly presented in that case. It is there recognized as a dangerous doctrine, to sustain which would jeopardize the interests of society and the security of life. Mr. Justice VALENTINE says that "it is possible that an insane, uncontrollable impulse is sometimes sufficient to destroy criminal responsibility, but this is probably so only when it destroys the power of the accused to comprehend rationally the nature, character and consequences of the particular act or acts charged against him, and not where the accused still has the power of knowing the character of the particular act or acts, and that they are wrong." Further along he says, "the law will hardly recognize the theory that any uncontrollable impulse may so take possession of a man's faculties and powers as to compel him to do what he knows to be wrong and a crime, and thereby relieve him from all criminal responsibility. Whenever a man understands the nature and character of an act, and knows that it is wrong, it would seem that he ought to be held legally responsible for the commission of it, if in fact he does commit it." In a very recent case the Supreme Court of Missouri considered the refusal of the trial court to charge, that if the defendant obeyed an uncontrollable impulse springing from an insane delusion, he should be acquitted. The

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court repudiated that doctrine, and Judge SHERWOOD remarked, in deciding the case, that "it will be a sad day for this State when uncontrollable impulse shall dictate a rule of action to our courts." *State v. Pagels*, 4 S. W. Rep. 981. It is true that a few of the courts have adopted this principle, but by far the greater number have disapproved of it, and have adopted the test which was given in the present case. *Lawson Insan.* 270, 303.

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CASES
IN THE
SUPREME COURT
OF
MISSOURI.

HOWE V. WILSON.

(91 Mo. 45.)

Will—charity—uncertainty.

A bequest in trust "to divide said remainder among such charitable institutions in the city of St. Louis as he (the trustee) shall deem worthy," is valid. (See note, p. 230.)

ACTION to set aside a will. The opinion states the case. The defendant had judgment below.

Miles & Flitcraft, for plaintiff in error.

E. C. Elliott, for defendant in error.

BLACK, J. The petition in this case contains two counts. The first is an action at law to contest the validity of the will of James W. Handfield. On this count there was a trial which resulted in a judgment sustaining the will. The second count is in the nature of a bill in equity to have a clause of the will declared void for uncertainty. A demurrer to this count was sustained, and to reverse the judgment sustaining the demurrer and dismissing the petition, the plaintiff sued out this writ of error.

From the petition it appears that the plaintiff is the only heir of Elizabeth Handfield, who died in 1882; she was the widow and only heir of James W. Handfield, who died in 1881. The will was

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duly probated at the death of Mr. Handfield. It is set out in full and in substance is as follows: The testator enumerates the property of which he is possessed, which is wholly personal property, all of which is bequeathed to Alexander Wilson in trust, for the sole use of Elizabeth Handfield, wife of the testator. Directions are then given the trustee as to the management of the property, with power in him to apply the interest and income, and to use from the principal if needed for her support, and at her death to provide a suitable burial. The trustee is required to buy a cemetery lot for the burial of the testator and his wife and to reserve sufficient funds to keep the graves in good condition. There is then the following provision: "If there should be a remainder after such sums are provided for after the death of my said wife, I direct said Wilson to divide said remainder among such charitable institutions of the city of St. Louis, Missouri, as he shall deem worthy." Wilson is made executor of the will, qualified as such, and the estate is alleged to consist of property valued at \$5,000 or \$6,000.

The law is well settled that the courts of this State have jurisdiction over the subject of charities, charitable devises and bequests. *Chambers v. City of St. Louis*, 29 Mo. 543; *Academy of Visitation v. Clemens*, 50 Mo. 167; *Schmidt v. Hess*, 60 Mo. 591; *Baptist Church v. Robberson*, 71 Mo. 326; *Russell v. Allen*, 107 U. S. 163. The jurisdiction is not dependent upon the statute of 43 Eliz., chap. 4, for it is now conceded that Courts of Chancery had an inherent jurisdiction over charities before the enactment of that statute. That the statute, in so far as it declares what were existing charities, has had an influence in many of the States, this State not excepted, must be conceded, though the details are wholly inapplicable here. We have no statute which undertakes to exercise the prerogative power of the king over those charities which did not come within the ordinary jurisdiction of the courts, and hence with us some charities will fail which would not fail in England.

Coming then to the question in dispute in this case two things are to be kept in view which render it unnecessary to examine a number of cases cited by the plaintiff. In the first place the bequest is for charitable institutions. The testator must be taken to have used the word "charitable" in its legal signification. No question then can arise as to the character of the bequest. The trustee has no power to dispose of the fund for any purpose other than that strictly charitable. In the next place there is a living

trustee in whom the testator vested the power to divide the fund among such institutions as he should deem worthy. Though the institutions are not designated, yet the means of designating them is provided, and there is no claim that the trustee refuses to act. The case concedes that he will discharge the duty imposed upon him. The question then is, with the bequest purely charitable and a trustee with power to execute it, is it void for uncertainty? Mr. Perry says: "There is a wide distinction between a gift to charity, and a gift to a trustee to be by him applied to charity. In the first case the court has only to give the fund to charitable institutions which is a ministerial or prerogative act; in the second case the court has jurisdiction over the trustee as it has over all trustees, to see that he does not commit a breach of his trust or apply the funds in bad faith or to purposes that are not charitable. * * * The courts in America have generally declined, in the absence of legislative authority, to administer these indefinite gifts to charity, or religion, or education or public utility, unless there was a trustee appointed by the testator to exercise his discretion in applying the gift to particular objects or persons." 2 Perry on Trusts, § 719.

In *Chambers v. City of St. Louis*, *supra*, the devise was "in trust to be and constitute a fund to furnish relief to all poor emigrants and travellers coming to St. Louis on their way, *bona fide*, to settle in the west." That devise was held valid and sufficiently definite and certain, after an elaborate and thorough investigation of the subject. There, it is true, a class of persons was selected to receive aid from the fund; here charitable institutions, within a limited and defined locality, are selected. We do not see that the difference affects the application of any principle upon which that case was decided. The more recent case of *Schmucker's Estate v. Reel*, 61 Mo. 592, does not in the least conflict with *Chambers v. City of St. Louis*, *supra*, or with any thing before stated in this opinion. In that case it clearly appeared that the executor took the bequest, clothed with a trust for specific and definite purposes, known to the executor, but not defined or stated in the will. As to the purposes not stated, it was as if no will had been made. The principal question in the case has no relevancy here whatever.

In *Saltonstall v. Sanders*, 11 Allen, 446, the testator gave the residue of his estate to his executors, as trustees, to hold and invest the same, and the income, in such manner as might to them seem expedient, and among other things "in aid of objects and pur-

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poses of benevolence or charity, public or private." The conclusion was reached, both upon principle and authority, that a bequest for "objects and purposes of charity, public or private," was a valid charitable gift. It is to be observed the word, "benevolence," was used in connection with the word, "charity." This gave rise to a further discussion, about which we are not called upon to express any opinion in this case. In this case we have endeavored to show at the outset that the bequest is to charity only.

In *Miller v. Teachout*, 24 Ohio St. 525, the will contained the following clause: "I direct that my said executor shall appropriate and use all the residue of my estate for the advancement and benefit of the Christian religion, to be applied in such manner as in his judgment will best promote the object named." It is there suggested that if the object of the trust had not been aided by further provisions, the validity of the bequest might well be questioned. The gift was held to be valid however because the testator had invested the executor with power to specify the particular use of the fund, and all objections, because of uncertainty, were thereby removed.

It is essential to a charitable bequest that the objects to be benefited should be to some extent indefinite; or as said in *Fountain v. Ravenel*, 17 How. (U. S.) 384, "It is no charity to give to a friend. In the books it is said that the thing becomes a charity when the uncertainty of the recipient begins." The foregoing examples will serve to show that if the general objects of the bequest are pointed out, or if the testator has fixed a means of doing so by the appointment of trustees with that power invested in them, then the gift must be treated as sufficiently definite for judicial cognizance, and will be carried into effect. Perhaps the rule may be stated more favorably to the validity of the trust. *Perry Trusts*, §§ 720, 732.

But we have no occasion to go any further in this case. Here the testator has provided a means for making that certain which otherwise might appear to be uncertain. We see no difficulty in upholding the gift in this case. It comes fairly within that class of charities where the courts can and will direct the trustee to carry out the will of the testator.

The judgment is therefore affirmed.

Judgment affirmed.

BRACE, J., absent; the other judges concurred.

NOTE BY THE REPORTER.—See *Webster v. Morris*, 66 Wis. 486; s. c., 57 Am. Rep. 909; “for the relief of the resident poor in a certain village,” *held*, valid. To “establish a school for the education of young persons in the domestic and useful arts.” Same case. *Held*, valid. “For such charitable and religious purposes and objects, and in such sums and in such manner as will in his judgment best promote the cause of Christ,” *held*, invalid. *Maught v. Getzendanner*, 65 Md. 527; s. c., 57 Am. Rep. 252. “For the aid and support of those of my children and their descendants who may be destitute, and in the opinion of said trustees need such aid,” *held*, invalid. *Kent v. Dunham*, 142 Mass. 216; s. c., 56 Am. Rep. 667. For testator’s “next of kin who may be needy,” *held*, invalid. *Fontaine’s Adm’r v. Thompson’s Adm’r*, 89 Va. 229; s. c., 56 Am. Rep. 588. “To be used at discretion by the selectmen of B. for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic widows and orphans, residing in B.,” *held*, valid. *Beardsley v. Selectmen of Bridgeport*, 53 Conn. 489; s. c., 55 Am. Rep. 152. “For such charitable institution for women in the city of Chicago as he may select,” *held*, valid. *Mills v. Neuberry*, 112 Ill. 123; s. c., 54 Am. Rep. 218. For a home “for aged, respectable, indigent women who have been residents of New London,” *held*, valid. *Coit v. Comstock*, 51 Conn. 352; s. c., 50 Am. Rep. 29. “To be distributed by them (executors) after my decease among my relations, and for benevolent objects, in such sums as in their judgment shall be for the best,” *held*, valid. *Goodale v. Mooney*, 60 N. H. 528; s. c., 49 Am. Rep. 334. For the suppression of the manufacture and sale of intoxicating liquors, *held*, valid. *Haines v. Allen*, 78 Ind. 100; s. c., 41 Am. Rep. 555. “To assist, relieve and benefit the poor and necessitous persons, and to assist and co-operate with any such charitable, religious, literary and scientific societies and associations, or any or either of them, as shall appear to the trustees best to deserve such assistance or co-operation,” *held*, valid. *Suter v. Hilliard*, 132 Mass. 412; s. c., 42 Am. Rep. 444. For “the education of the scholars of poor people” of a certain county, *held* valid. *Clement v. Hyde*, 50 Vt. 716; s. c., 28 Am. Rep. 522. “Among such Roman Catholic charities, institutions, schools or churches in the city of New York,” as a majority of the trustees should select, and in such sums as they should think proper, *held*, valid. *Power v. Cassidy*, 79 N. Y. 602; s. c., 35 Am. Rep. 550. “For the purchase and distribution of such religious books as they shall deem best,” *held*, valid. *Simpson v. Welcomes*, 72 Me. 496; s. c., 39 Am. Rep. 349. To “distribute to such persons, societies or institutions as they shall consider most deserving,” *held*, valid. *Nichols v. Allen*, 130 Mass. 211; s. c., 39 Am. Rep. 445. “For any and all benevolent purposes that he may see fit,” *held*, void. *Adye v. Smith*, 44 Conn. 60; s. c., 26 Am. Rep. 424. “Among such incorporated societies organized under the laws of the State of New York or the State of Maryland, having lawful authority to receive or hold funds upon permanent trusts for charitable or educational uses,” as the trustees might select, and in such sums as they should determine, *held*, void. *Pritchard v. Thompson*, 95 N. Y. 76; s. c., 48 Am. Rep. 9. “To aid indigent young men” of a certain town “in fitting themselves for the evangelical ministry,” *held*, valid. *Trustees, etc., v. Whitney*, Conn. Sup. Ct., Jan. 26, 1897.

In the last named case the court said: "The gift over to the second charitable use is not void for uncertainty. It is to 'aid indigent young men of said town of Mansfield in fitting themselves for the evangelical ministry.' These supplied, and a surplus existing, that is to go 'in aid of other indigent young men in this State' fitting for the same ministry. Neither of the words 'indigent' or 'evangelical' is of rare use or hidden meaning. They are quite within ordinary intelligence, and point with a sufficient degree of certainty to the individual to enable the statute of charitable uses to distinguish him from all others. It is a sufficiently accurate statement in this connection to say that they describe a man who is without sufficient means of his own, and whom no person is bound and able to supply, to enable him to prepare himself for preaching the gospel. The trustees are the persons who for the time being hold office as selectmen of a town — an office of continuous duration. To them the donor has given power, and upon them imposed the duty of determining the persons who meet the specified requirements and who are to become beneficiaries. There are persons to determine and a rule for their guidance. These constitute a valid foundation for charitable use."

In *Hunt v. Fowler*, Sup. Ct. Ill., June 17, 1887, a will contained this residuary clause: "All the rest and residue of my estate, including that which may lapse for any cause, I direct to be invested or loaned upon the best terms possible, so as to produce the largest income, and said income to be distributed among the worthy poor of La Salle, in such a manner as a Court of Chancery may direct." *Held*, that this created a valid charitable trust, under the control of chancery, and was not void for uncertainty in the beneficiaries. The court said:

"The entire contention in this case arises upon the construction, validity and effect of this residuary clause of the codicil. It is insisted this clause is void for uncertainty as to the beneficiaries.

"This is not a bequest to charity generally, or to the poor generally, but to the worthy poor of the city of La Salle. The class here is definite — the worthy poor of the city of La Salle — but the individuals of the class to whom the bounty is to be distributed are uncertain. There is always this uncertainty as to individuals, in the case of public charities, and it is this feature of uncertainty which distinguishes public charities from private charities, charitable trusts from private trusts; and to hold charitable gifts to be void because of such uncertainty is to reject this whole distinctive doctrine of charitable trusts. 2 Redf. Wills., 544 (66).

"In the case of a charitable bequest it is immaterial how vague, indefinite and uncertain the objects of the testator's bounty may be, provided there is a discretionary power vested in some one over its application to those objects. *Domestic & F. M. Soc.'s Appeal*, 30 Penn. St. 425; *Perry Trusts*, § 782. It is denied that there is any such discretionary power here given, and *White v. Fiske*, 22 Conn. 81, is cited in support of such denial. The bequest in that case was: 'Any surplus income that may remain, to the extent of \$1,000 per annum, I direct to be expended by my said trustee for the support of indigent, pious, young men preparing for the ministry in New Haven.' The decision was that the gift was void, as the objects of the benefaction were indefinite, and that no power was conferred on the trustees to make them definite by

selection. This case, though meeting with seeming approval in *Grimes' Heirs v. Harmon*, 35 Ind. 198, has been disapproved by other high authorities. See *Perry Trusts*, §§ 713, 720, 748, note 1; 3 Redf. Wills (3d ed.), 541, note; *Hesketh v. Murphy*, 26 N. J. Eq. 304. The latter case especially speaks of *White v. Flak*, as a case not likely to be followed.

"In *Hesketh v. Murphy*, the testator's will empowered and directed the trustees to employ the annual income of the fund 'for the relief of the most deserving poor of the city of Paterson aforesaid, forever, without regard to color or sex; but no person who is known to be intemperate, lazy, immoral, or undeserving, to receive any benefit from the said fund.' It was objected that the gift could not be applied to its objects and was void, because the will did not confer upon any one the power of ascertainment of the individuals who should receive the benefit of the bequest. But the court held that the power given the trustees by the will to distribute the fund carried with it, by necessary implication, the power to select the beneficiaries from the designated class, and upheld the bequest. We entirely agree with the criticism there made by Chief Justice BEASLEY upon the case of *White v. Flak*, that there was a mistaken assumption on the part of the court in that case that there was no power to select the objects of the charity lodged by the testator in the trustee; that when a power is conferred on the trustees to distribute the fund to members of a class, such members having certain qualifications which can be ascertained only by the exercise of judgment and discretion, as the act of distribution cannot be performed except after such ascertainment of the particular beneficiaries, the principal power to distribute the money carries with it the incidental and necessary power of selection; and this, upon the ordinary doctrine, that when one act is authorized to be done by a trustee or other agent, every authority requisite to the doing of such act is by intendment of law comprised in such grant or power. See *Pickering v. Shotwell*, 10 Penn. St. 23, that the power in the trustees to act at its discretion need not be expressly given, if it can be implied from the nature of the trust. In the later cases of *Bratins v. Whitehead*, 84 Ind. 357, the decision in *Grimes v. Harmon*, does not seem to be approved in its full extent.

"In *Heuser v. Harris*, 43 Ill. 455, the bequest of money was 'to the poor of Madison county,' the interest only to be used, with no appointment of a trustee. As the County Court of Madison county was charged by law with the support of the paupers of the county, it was held in that particular case that the poor of the county were its paupers, and that the fund should be held by the County Court to be applied for the latter's support. It is not to be the inference from that case that a charitable bequest to the poor necessarily means to paupers, and that the trust is only to be executed by somebody charged by law with the support of paupers. 'A bequest in trust for the poor inhabitants of a particular place, parish, or town is a charitable trust for the poor not receiving parochial or municipal aid and relief as paupers, on the ground that the charity is for the poor, and not for the rich, and if it was applied to the maintenance of those supported by the parish, town, or county, it would relieve wealthy tax payers from their taxes, and not materially aid the poor.' *Perry Trusts*, § 698.

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"It is said in Redf. Wills (2d ed.), 805, that some of the American cases have gone great lengths in carrying into effect the intention of the testator when there was great indefiniteness in the objects of the trust; 'that the want of a trustee in such cases is never any obstacle in the way of a court of equity carrying into effect any trust, and more especially one of a charitable character.' Mr. Pomeroy, in speaking of the distinguishing features between charitable and private trusts, says that in case of the former, 'not only may the beneficiaries be uncertain, but that even when the gift is made to no certain trustee, so that the trust if private would wholly fail, a court of equity will carry the trust into effect either by appointing a trustee, or by acting itself in place of a trustee.' 2 Pom. Eq. Jur., §§ 1025, 1026. And see *Brown v. Kelsey*, 2 Cush. 242; *Washburn v. Sewall*, 9 Metc. 280.

"There can be no question of the general rule. But it is said it does not apply in a case where there is such indefiniteness as to beneficiaries as here. Numerous are the instances which might be cited where there was the want of a trustee, and the court executed the trust in cases of equal indefiniteness as here as to the objects of the trust. As in *McCord v. Ochiltree*, 8 Blackf. 15, where the legacy was for the education of the pious, indigent youths; in *Bull v. Bull*, 8 Conn. 47, where the executors were to dispose of the residue of the estate 'among our brothers and sisters and their children as they shall judge shall be most in need of the same — this to be done according to their best discretion — and the executors died never having exercised the power, nor executed the trust; in *Williams v. Pearson*, 38 Ala. 299, where the beneficiaries named were 'all the paupers and poor children of two designated 'beats' whose parents were not able to support them; in *Howard v. American Peace Soc.*, 49 Mo. 288, where the gift was to the suffering poor of the town of Auburn. Where a legacy is given to trustees to distribute in charity, and they all die in the life-time of the testator, yet the legacy will be enforced in equity. 2 Story Eq. Jur., § 1166. An extended collection of cases on the general subject may be found in note to *Hesketh v. Murphy*, 35 N. J. Eq. 23, and 1 Jarm. Wills, 408, in note.

"Mr. Perry sums up as the result of the principles and authorities, that 'a bequest for charity generally, * * * or to the poor generally, or to charity generally, with no trustees appointed, will not be carried into effect by the courts in this country.' Perry Trusts, § 729. That 'if a testator makes a general and indefinite bequest to charity, or to the poor, or to religion, and appoints no trustees, but plainly refers such appointment to the courts, there would seem to be no impropriety in the court appointing a trustee according to the plain intent of the donor, leaving such trustee to find his power in the will of the donor. But if a testator makes a vague and indefinite gift to charity, and names no trustee, and gives no power to the court to appoint one, there is no power in the American courts to administer such an inchoate and imperfect gift.' Perry Trusts, § 731. That 'it is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be.' See 732. See also 2 Story Eq. Jur., § 1169."

"Courts incline strongly in favor of charitable gifts, and take special care to enforce them. As observed by Mr. Perry (§ 687), charitable bequests are said to come within that department of human affairs where the maxim *ut res magis valeat quam pereat* has been and should be applied; and further (§ 600), that until the statute of distribution, 23 Car. II, chap. 18, was enacted, the ordinary was obliged to apply a portion of every intestate estate to charity, on the ground that there was a general principle of piety and charity in every man. This shows the favor in which charity is held in the law. There is to be the most liberal construction of the donor's intention in support of a charitable donation. Charities have always received a more liberal construction than the law will allow in gifts to individuals. 2 Story Eq. Jur., § 1165."

"The charity here is not vague and indefinite, but quite specific, to the worthy poor of the city of La Salle. Individuals of the class named will ever be readily found to whom the fund may be distributed. The trust is not difficult of execution according to the intention of the testatrix. Instead of herself naming a trustee to make the distribution of her bequest, the testatrix preferred the distribution should be made by a Court of Chancery, whose peculiar province it is to effect the administration of trusts, and especially charitable trusts. There can be no doubt that the execution of the trust by such court would be to effectuate the donor's intention, the aim which is always sought to be accomplished.

"Under the principles and the strong current of authorities which are properly applicable, we are fully satisfied that the bequest in question is a valid charitable gift, and that it should be carried into effect by a Court of Chancery, as the testatrix expressly willed that it should be."

The following is an abstract of *Bristol v. Bristol*, 58 Conn. 243.

This case involves the construction of the following clause of a will: "I hereby authorize and empower my executrix to disburse and give (in furtherance of my wishes expressed to her at sundry times) from my estate, to such worthy persons and objects as she may deem proper, such sums as it is her pleasure thus to appropriate, not to exceed in all the total sum of \$5,000." Is this a valid gift? It clearly is not a trust. There is no person or object named, or even hinted, as the *cestui que trust*. There is no person who could claim in a court of equity an enforcement of the trust. It is a case where, if the \$5,000 had been given to the executrix to be disposed of at her pleasure, the law would regard the property given as vested in her, while the direction for its use was merely precatory and of no legal force. In such a case the law regards the legatee as taking the gift absolutely, and with no enforceable duty as to its use. But there is no gift to the executrix. She has merely a power of distribution. Nothing vests in her. It is precisely as if no disposition whatever of the fund had been suggested, but the executrix had been empowered to direct how \$5,000 of the estate should go. It is, in other words, an authority given to a third person to direct how a part of the testator's property should be disposed of. If good for a part of the estate, it would be good for the whole. Would then a will in the following words be a valid one: "I direct that A. B. shall declare how all my property shall be disposed of." The supporters of this will say that such a will would be valid, and quote in

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support of their claim a dictum of Judge SEYMOUR in *Wait v. Huntington*, 40 Conn. 11, as follows: "It is familiar law that a testator may confer on executors and on others an absolute power of appointment and disposition over his property." But the case itself did not call for this remark, nor involve the question of its correctness, and it seems hardly probable that the learned judge intended that it should have the wide application given it. There is a singular absence of all reference to this question in the text-books, and we have found no decisions that bear with any directness upon it. In the absence of such authority we should regard such a will as of no legal effect. We think the law never intended to accept as a valid will so vague and indefinite a direction such a mere authority. It is in no proper sense a will. It indicates no intent whatever on the part of the testator as to the disposition of his property. It is really a public declaration that he has no such intent. It is a travesty of terms to call such an instrument a will. The bequest being inoperative, the \$5,000 appropriated by it falls into the residue. This is the well-settled rule in the case of void bequests of personal property. *Greene v. Dennis*, 6 Conn. 292; s. c., 16 Am. Dec. 58; *Thayer v. Wellington*, 9 Allen, 295; *James v. James*, 4 Paige, 115.

The following is an abstract of *Crisp v. Crisp*, 65 Md. 422: Trustees in a will were empowered to spend a certain sum in erecting a church and parsonage, and were authorized, empowered and directed, upon completion thereof, to make a good and sufficient conveyance of said church, parsonage and grounds, and to turn over any balance of the said sum remaining in their hands to such organization or society, or organization of the Presbyterian Church in the State of Maryland as they in their judgment might see fit and deem best, etc. A codicil provided: "In explanation of the bequest to the church, in case it being carried out, I wish and desire it to be a branch of the Central Presbyterian Church," etc. Held, that the trust was sufficiently certain and valid. Had he pursued a different course, and given the \$50,000 directly to the Central Presbyterian Church of Baltimore, and directed that corporation to erect a church and parsonage at Brooklyn, in Anne Arundel county, the legal question would have been the same. "If," says the court in *Barnum's* case, 62 Md. 275; s. c., 50 Am. Rep. 219, "there be parties capable of taking the subject-matter of the trust, and objects legal and definite to be subserved or benefited by its execution, so that a court of equity may take cognizance of and enforce the trust, these are the essentials and only essential to the validity of the trust, though the object of the trust be in its nature charitable. We have already seen that there is a party capable of taking the subject-matter of the trust. That the object was legal and sufficiently definite there is but little doubt. The testator prescribed the place where the church should be built, the amount of its cost, and the purpose to which it should be dedicated. What more ever was or could be done by a testator who desired to devote a portion of his property to a charitable use? He had the right to do as he pleased with his property, provided his object was a legal one, and his whole object will be accomplished when the church is built and conveyed to the Central Presbyterian Church of Baltimore. This direction of his can certainly be enforced by a court of equity. It may so happen that a worshipper may never

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enter the doors of the church or the pastor the parsonage, but such a possible contingency will not prevent a court of equity from decreeing that the present and clearly defined purpose of the testator shall be carried out. The books are full of cases where money or property is left to build hospitals for the afflicted and schools for the promotion of education. The testator can provide for the benefit of the community, but we cannot compel them to accept it. So when Mr. Crisp provided the means for building the church, selected the place where it should be located, and appointed the agents to do the work, and designated who should own and hold it, he had done nothing that the courts cannot enforce. All this was manifestly intended for the use and benefit of the people of Brooklyn. Whether they will use as directed by him and appreciate his noble charity rests with them; at least that question cannot arise now, that use is certain. The form of worship of the Presbyterian Church is as well known as any other form of worship. The case differs entirely from *Smith's* case in 58 Md. 342.

PECK V. CHOUTEAU.

(31 Mo. 140.)

Malicious prosecution — Liability of attorney.

To render an attorney liable for a malicious prosecution by his client, it must not only appear that he knew that the prosecution was malicious, but that he knew it was without cause.

ACTION for malicious prosecution. The opinion states the point.

James J. Lindley and *F. J. Bowman*, for appellant.

S. Herrman and *G. A. Mahill*, for respondent.

BLACK, J. This was an action for malicious prosecution, in which Charles P. Chouteau, John M. Glover, and Joseph H. Livingston were made defendants. The cause was dismissed as to Livingston. Verdict and judgment for the defendants, from which the plaintiff appealed.

The substantial averments of the first count are, that on the eighteenth of July, 1882, the plaintiff was indicted on a charge of fraudulent conspiracy with Engelke and Barrett to defraud Alice Livingston and others interested in a corporation known as the Windsor Hotel Company; that he was arrested on the twenty-sixth of July, 1882, and tried and acquitted on the twenty-first of De-

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ember, 1882, in the court of criminal correction of St. Louis; that Chouteau was a member of the grand jury which returned the indictment, Livingston a witness, upon whose false statements the indictment was procured, and Glover assisted in its procurement, that the defendants, maliciously and without probable cause, procured the indictment and caused the plaintiff to be arrested and prosecuted thereunder. The second count, omitting the various charges of malice and want of probable cause, states that the defendants procured the arrest of the plaintiff on the twenty-second of December, 1882, upon a false charge of conspiring to defraud Alice Livingston; that this charge was withdrawn, on the fifteenth of January, 1883, but before it was withdrawn, and on the same day, another one was lodged against him, upon which he was arrested; that he was tried in the same court, acquitted, and discharged on the sixteenth of March, 1883.

The answer of Chouteau is a general denial, with the averment that at and prior to the alleged grievances the general reputation of the plaintiff for honesty and integrity was bad. Glover made a like answer, with the additional averment, that whatever he did was done as a duly enrolled and practicing attorney, and not otherwise.

Very little of the evidence offered on the trial, which was hotly contested, lasting for at least two weeks, is preserved. The record recites that plaintiff offered evidence tending to prove the allegations of the petition, and there was evidence tending to sustain the issues on behalf of the defendants, and to disprove the averments of the petition. The records from the court of criminal correction are in evidence, and they show that the plaintiff was arrested, tried, and acquitted on the indictment and on the information, as stated in the petition. They show however that Barrett and Bernard H. Engelke were also included in the same prosecutions with plaintiff, and were also acquitted.

[Other points omitted.]

Finally as to the plaintiff's refused instructions. These relate to Glover only as the attorney of Chouteau. The fact that the client is actuated by malice and the attorney liable for malice alone would not even make out a case against the client. If there is probable cause for the prosecution then the suit for malicious prosecution must fail, though malice be clearly shown; and it must follow that knowledge on his part by the attorney that the client is actuated by malicious motives, is not sufficient to make the attorney

liable. But if the attorney knows that the client is actuated by malice, and also knows that there is no cause for the prosecution, the dictates of common honesty required that he also should be made accountable. As said in *Burnap v. Marsh*, 13 Ill. 538. "Where the client will assume to dictate a prosecution upon his own responsibility, the attorney may well be justified in representing him so long as he believes his client to be asserting what he supposes are his rights, and is not making use of him to satisfy his malice. But when an attorney submits to be made the instrument of prosecuting and imprisoning a party against whom he knows his client has no just claim or cause of arrest, and that the plaintiff is actuated by illegal or malicious motives he is morally and legally just as much liable as if he were prompted by his own malice against the injured party." The rule is more favorably stated for the defendant in *Bicknell v. Dorion*, 16 Pick. 478, where the following conclusion is reached: "In order therefore to charge an attorney upon this ground (a conspiracy to bring a groundless suit) it must not only appear that there was an agreement to bring an action which was in fact groundless, and which the attorney supposed to be groundless, but that it was agreed to bring an action understood by both parties to be groundless and brought as such." We are not prepared to go further than is indicated in the extract from *Burnap v. Marsh*, *supra*, and think it asserts a salutary and reasonable rule. Now in this case it is to be observed that in so far as it can be said in any view of the case that Mr. Glover acted outside of or beyond his professional capacity, the instructions given are full and favorable to the plaintiff and no other instruction should have been given upon that branch of the case. The instructions do not predicate a right to recover upon the fact that Mr. Glover knew that the action was groundless, and that he knew that Chouteau acted in the matter from malicious motives; but they say that if he knew, "or by the exercise of reasonable diligence, might have known that there were no facts sufficient to constitute probable cause," etc. The attorney has a right to advise and act upon the facts which he gets from his client and it is not his duty to go elsewhere for information. According to these instructions an attorney could not with safety advise the arrest of any criminal until he has exhausted reasonable diligence in search for information as to whether a crime had been committed. He would stand on no other or different ground from that of the client. The statement of such a proposi-

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tion is enough to condemn it. We state again that the attorney has a right to advise and act upon such information as the client reveals to him. Nothing short of complete knowledge on the part of the attorney that the action is groundless, and that the client is acting solely through illegal or malicious motives should make him liable in these actions. As said by Mr. Justice BRADLEY in *Campbell v. Brown*, 2 Woods, 350: "If attorneys cannot act and advise freely and without constant fear of being harassed by suits and actions at law parties could not obtain their legal rights."

The judgment of the Circuit Court is affirmed, in which all
concur. *Judgment affirmed.*

DESCOMBES v. WOOD.

(91 Mo. 196.)

Banks—assignment for creditors—power of directors.

The board of directors of an insolvent bank may make a general assignment of its property for creditors without the previous consent of its stockholders.

ACTION to set aside an assignment. The opinion states the case. The defendants had judgment below.

S. P. Sparks, for plaintiff in error.

A. Comingo, for defendants in error.

RAY, J. Plaintiff brought this action against Joseph Brown, assignee of the Warrensburg Savings Bank, and against said bank to set aside a deed of assignment from the bank to said Brown, and to divest the assignee of all right, title and interest, in and to the property conveyed, and to restore and invest title to, and control over the same to the bank, and to enjoin the assignee from asserting title thereto. Since the institution of the suit, and while the same was pending in this court on writ of error, as appears by stipulation in the cause, said Brown has departed this life, and said Woods has been duly appointed his successor as such assignee, and duly qualified as such. Plaintiff was a stockholder in the bank, and also one of its creditors at the time of the assignment, on account of money theretofore loaned to it, and evidenced by certain

certificates of deposit, and in February, 1881, he recovered judgment against the bank upon said indebtedness, in the Circuit Court of Johnson county, Missouri, which said judgment remains in force unpaid and unsatisfied.

On January 17, 1880, a majority of the board of directors of said bank met in regular session, and upon motion duly seconded, resolved that they believed it to be to the interest of all concerned that Joseph Brown be appointed assignee to settle up the business of the bank, and that William Calhoun, president, and Amos Markee, cashier, be authorized and directed to execute and deliver to said Brown, as assignee, a deed of assignment, in form of law, conveying to him all the property owned by the bank, to be held for the benefit of all its creditors according to the laws of this State.

Afterward, on the 26th day of January, 1880, a deed of assignment was, under authority of said resolution, executed, acknowledged, and delivered to said Brown, who caused the same to be recorded in the office of recorder of deeds for Johnson county, Missouri, on the 26th day of January, A. D. 1880, and immediately thereafter, and in pursuance and by virtue of said instrument, took possession of all the property and effects of the bank, and is asserting title thereto and exercising control thereof, to the exclusion of all other persons. Said deed of assignment and the acknowledgment thereof are set out in the petition, but are omitted from this opinion, for the reason that they already appear in full in the case of *Eppright v. Nickerson*, 78 Mo. 484, 485, to which reference is here had. The above facts, except as to the successorship of said Wood (which appears by said stipulation, filed in this court) appear from the petition in this case, which further avers, in substance, that the said majority of said board of directors adopted, and caused to be entered upon the records of the proceedings of said board, the said resolution of January 17, 1880, without authority from, or notice to the owners and holders of the shares of the capital stock of said corporation, and without notice, assent, or knowledge, and against the desire of plaintiff, and that the said deed of assignment, having been executed without the assent or knowledge of the said several shareholders, is void, and of no binding force, as against them; that the specified directors, constituting a majority of the board, have conspired to and with defendant Brown, and are aiding and abetting him to claim possession of the property and effects of said corporation, under the said instrument, and refuse to

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bring this suit in the name of the corporation against said Brown, for the relief of the shareholders, and that plaintiff therefore brings the same, on his own behalf, and in behalf of all other shareholders in said corporation, similarly situated.

Defendants interposed a demurrer to the petition, assigning as the grounds therefor that the same does not state facts sufficient to constitute a cause of action; that there is a defect of parties plaintiff, and that if plaintiff ever had a right of action, as claimed, he is, by his own showing, estopped from now asserting it. This demurrer was sustained by the court, and the propriety of its action, in this behalf, is the only question before us for review and determination. The plaintiff, it will be perceived, sues in his own behalf, and in behalf of those similarly situated, without stating who they are or how numerous, or whether they constitute a majority, or otherwise, of the creditors and stockholders, both of which he shows himself to be. If the assignment however is *ultra vires*, and void, as claimed, any portion of the shareholders may, it seems, be complainants, or even a single one of them, and in that event, the action properly purports to be brought by the given plaintiff, and others similarly situated. 1 Morawetz Priv. Corp., § 408, and cases cited. The petition, in this case, it will be seen, does not, directly and in terms, charge, either one way or the other, as to the solvency or insolvency of the corporation, at the date of the resolution, or at the date of the said deed of assignment, nor does it charge the directors with any fraudulent intent, or fraud in fact in the premises, nor does it negative the grounds given in the resolution to assign, that such course was required, in the best interests of all concerned. Moreover, we may add that it is not alleged that the assignee had mismanaged or wasted, or is about to mismanage or waste, the assets, or that the interests of the stockholders would be promoted by the grant of the relief prayed for.

The resolution, in itself, does not purport the insolvency of the bank, but only, perhaps, failing circumstances, and present inability to convert its assets into cash, and to pay its debts on demand.

But as against the pleader, so failing to allege the solvency of the bank, or its ability, ultimately, with proper management, to meet its liabilities, taken in connection with the actual assignment by said deed for the benefit of creditors, we think the case presented is one solely as to the power of a board of directors of an insolvent banking corporation, acting in good faith, to make an assignment

of all its property, for the benefit of all its creditors, without the consent first had and obtained of all its stockholders. The question thus presented was not, we may say at the outset, presented for decision in the case of *Eppright v. Nickerson*, 78 Mo. 482. In the course of that opinion, the following statements occur: "In the case at bar; no stockholder is complaining of the action of the directors, and the only stockholder who is a party to the suit, relies upon the assignment to defeat plaintiff's action against him. It does not appear that the stockholders did not consent, nor that any of the stockholders ever complained of the conduct of the directors." The plaintiff, in that action, was a creditor, and had proved up his debt before the assignee, and was then proceeding against defendant, by motion, under section 13, article 1, chapter 37 of Wagner's Statutes, and this court there held that as against him the assignment was valid, and that he could not make the objection that the same was *ultra vires* and void.

The single remark of the learned judge in the course of that opinion, to the effect that the assignment, by the directors, was *ultra vires* and void as to stockholders, if they did not consent thereto, is a mere *dictum*, as is apparent from the above statement of the actual question before the court for decision. The *dictum* is expressly based upon the authority of the case of *Abbot v. Hard Rubber Co.*, 33 Barb. 578, which decides, we think, a very different question from the one at bar, as is apparent from the language employed in the opinion of SUTHERLAND, J., at page 584, where it is said. "The sale and transfer in question was not, and did not purport to be, a sale of the property of the corporation for the benefit of its creditors." In that case, four of the seven directors, after passing a resolution to that effect, perfected an absolute sale in gross of all the stock, consisting of articles composed of India rubber, belonging to the corporation, and of all the dies, tools, etc., and of all rights held by the corporation under the Goodyear patents to manufacture such articles, thus destroying the corporation in its said business of manufacturing India rubber goods which was the object and purpose for which it was organized. There were other features in the transaction, such as the immediate association and incorporation of said purchasers and said four directors of the old corporation into a new company for the manufacture of goods composed of India rubber, and the immediate transfer to the new corporation by the said purchasers, of the effects and rights trans-

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ferred to them by said directors of the old corporation; but the case was disposed of upon the ground that as against the plaintiff who was a stockholder, not consenting thereto, the sale was invalid for a want of power in the corporation or said directors to make it.

Section 157, Field on Corporations, also referred to in *Eppright v. Nickerson*, *supra*, in this connection, is to the same general effect as the *Abbot* case, which is cited in the note. The instances mentioned in said section of acts not within the power of the directors, belong to this class of attempted sales and alienation of property essential and necessary to the transaction of the business of the corporation and to the prosecution of the purposes of its creation, and to application by them for legislative changes or enlargement of corporate powers, or to acts destructible of its corporate existence.

In the recent case of *Chew v. Ellingwood*, 86 Mo. 260; s. c., 56, Am. Rep. 429, at page 273, this *dictum* of the *Eppright-Nickerson* case, *supra*, is expressly ruled otherwise by this court, where it is said that "the point made by appellants' counsel that the assignment made by the directors is void, must be ruled against them. The right of the directors of a bank, in failing circumstances, to make an assignment for the benefit of creditors where there is nothing in the charter or general laws forbidding it, we think is clear." This position is abundantly supported by numerous authorities elsewhere and among them may be cited *Dana v. Bank of United States*, 5 W. & S. 223; *De Camp v. Alward*, 52 Ind. 468; *Union Bank v. Elliott*, 6 Gill & J. 363; *Burrill Assignments*, § 64; *Ang. & Ames Corp.*, § 191; *Morawetz Priv. Corp.*, § 240, and many others to the same effect might be added if necessary. The directors of such corporations are, it is true, agents appointed to manage the business in which the stockholders have embarked, and the desirability or advisability of continuing or discontinuing the business is a question, it is true, for the shareholders, or a majority of them, and not for their agents. They have no power, it is said, to dissolve the corporation or inflict upon it political death. But the insolvency of such a corporation without new action and subscription and contribution of new capital by the shareholders, itself defeats the purpose and object of the corporation, and the stockholders have no interest in the assets, which in that event equitably belong to the creditors, and the fiduciary relation of the directors in that event is no longer to the stockholders, who are without beneficial interests in assets insufficient to pay the debts of the

corporation, but to the creditors, whose equitable rights have intervened and whose equitable lien attaches thereon. *Morawetz Priv. Corp.*, §§ 578-9.

In *Chew v. Ellingwood*, *supra*, this court further say that "many of the authorities cited go to the extent of saying that under such circumstances the directors not only have the right, but that in justice they ought to make an assignment so that creditors might share equally in its assets. Indeed under Constitution and laws which make it a felony for directors and officers of a bank to receive deposits, knowing it to be in failing circumstances, it would seem to leave them no other alternative but to close its doors." We think we may, without further discussion, rest our conclusion upon these authorities in favor of their right to so assign in good faith, equally for all creditors, under the facts of this petition as we understand them to be.

And further we think it may well be questioned whether the plaintiff, upon his own showing, has seasonably begun his action in this behalf. At the date of the institution of the suit, the assignee had been in charge of the property for about four years, during which time he must be presumed to have been engaged, as the law requires, in execution of his trust, making exhibits of accounts, auditing and allowing the same, incurring costs and expenses, such as are incident to the execution of such trusts, and perhaps in paying dividends on the claims of creditors. Nothing is alleged by way of disability or want of knowledge in the premises or otherwise, showing excuse for so much delay, and as plaintiff is a creditor, protected as such, equally with all others, under said assignment, we cannot see that his attitude as stockholder, not consenting thereto, and invoking the doctrine of *ultra vires* after the lapse of so much time, is a meritorious one.

We are also earnestly asked to review our ruling in *Eppright v. Nickerson*, 78 Mo. 482, as to the sufficiency of the signing and acknowledgment of the said deed of assignment; but we see no good reason to change the views in that behalf, expressed in that case, and in the case of the *City of Kansas v. Railroad*, 77 Mo. 180, to which reference is there made.

For these reasons the judgment of the trial court, which was for the defendants, should be and is hereby affirmed.

Judgment affirmed.

All concur; SHERWOOD, J., in the result.

Slattery v. St. Louis and New Orleans Transportation Company.

SLATTERY V. ST. LOUIS AND NEW ORLEANS TRANSPORTATION
COMPANY.

(91 Mo. 217.)

Corporations—wrongful acts of officers—action by stockholders.

Stockholders of a corporation cannot maintain an action accruing to the corporation for breach of contract, and which its officers and directors refuse to bring.*

ACTION for breach of contract. The opinion states the case. The defendant had judgment below.

Dyer, Lee & Ellis, for plaintiff in error.

Givin Campbell, for defendant in error.

BLACK, J. This case is here from a judgment sustaining separate demurrers to the petition. The defendants are the St. Louis, New Orleans & Foreign Dispatch Company, the St. Louis and New Orleans Transportation Company, known as the Transportation Company, and the St. Louis & Mississippi Valley Transportation Company. The plaintiffs are three of the shareholders in the dispatch company, and they own three hundred and thirty of the one thousand shares of stock. The dispatch company was organized for the purpose of soliciting freight and making contracts for the transportation of the same by means and through the agency of inland and ocean carriers. It issues through bills of lading, but is not a carrier. At the dates hereafter named the transportation company was engaged in moving merchandise upon the Mississippi river. On the 5th of March, 1881, these two corporations made a written contract to continue for five years, whereby the dispatch company agreed to open offices and appoint agents to solicit business and make contracts at St. Louis and New Orleans, in the United States and at Liverpool, England, and at such other places as might be agreed upon. For the freight received and turned over by the dispatch company to the transportation company, the latter agreed to pay the former ten per centum of the amount by it earned and charged for the carriage of the merchandise over its own line.

**Doud v. Wisconsin, etc., Ry. Co.* (65 Wis. 108), 56 Am. Rep. 620.

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The petition proceeds to state that the dispatch company, pursuant to the contract, established agencies in the United States and foreign countries, at an outlay of \$25,000, made contracts for, and turned over to the transportation company a vast amount of tonnage; that in December, 1881, the members of the transportation company, and other persons not named, organized the St. Louis & Mississippi Valley Transportation Company, with a capital stock of \$2,000,000; that thereupon the old transportation company turned all of its boats, barges, elevators and other property over to the new corporation, for which the latter issued to the members of the former \$1,000,000 of paid-up stock; that the new corporation succeeded to the rights, property, business and good will of the old one, and that the old transportation company is insolvent. It is also stated that the new company was organized, and the property of the old one turned over to it, in pursuance of a conspiracy between the members of the old company and other persons to dissolve the old company, and to thereby evade and escape the duties and obligations arising out of the contract with the dispatch company; that the new company, which is the old one under another name, refused to carry out the contract, and refuses to pay the commissions due under it; that ten per cent of the amount charged and earned by the transportation company and its successor for carrying the freight called for by the contract has been, and will be, \$300,000, and that this amount, with the \$25,000, is the amount in which the dispatch company has been damaged by the breach of the contract.

Plaintiffs sue for themselves and all other stockholders, and state that more than a year previous to the commencement of this suit, the stockholders, by resolution, instructed the directors to commence a suit in the name of the company to vindicate their rights, which they refused to do; that the present officers obtained a majority of the stock for the purpose of preventing the corporation from asserting its rights; that the managing directors refuse to bring the suit, but have conspired with the other defendants to surrender all rights of the dispatch company arising from the contract. The prayer is for the recovery of the damages, and that the property of the new corporation, received from the old one, be declared a trust fund for the payment of the same, the appointment of a receiver, and for general relief.

The demurrers present the question whether these plaintiffs can maintain this suit. It is to be observed, at the outset, that the

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directors who refuse to bring the suit are not made defendants. It is not a suit to require any of the officers to account for their maladministration of the affairs of the company. It is an effort by the plaintiffs, as stockholders, in their own names, to collect damages due to the dispatch company from the transportation company, arising from a breach of a contract — a contract which had been made in the legitimate conduct of the affairs of the two corporations. The cause of action accrued to the corporation and not to the shareholders, and the general rule undoubtedly is, that all such suits must be brought by and in the name of the corporation. The question then is whether this case comes within any of the exceptions to that rule, for there are exceptions as well established as the rule itself.

The vice-chancellor, in *Foss v. Harbottle*, 2 Hare, 492, so often cited, after speaking of the general rule, made these remarks: "If a case should arise of injury to a corporation by some of its members, for which no adequate remedy remained, except that of a suit by individual corporators in their private characters, and asking, in such character, the protection of those rights to which in their corporate character they were entitled, I cannot but think that the principle so forcibly laid down by Lord COTTENHAM in *Wallworth v. Holt*, 4 Myl. & Cr. 635, and other cases, would apply, and the claims of justice could be found superior to any difficulties arising out of technical rules respecting the mode in which corporations are required to sue."

Where there has been a waste or misapplication of corporate funds by the officers or agents of the company, a suit in equity may be brought by the corporation to compel them to account for the waste or misapplication. "But as a court of equity never permits a wrong to go unredressed, merely for the sake of form, if it appear that the directors of a corporation refuse in such case to prosecute, by collusion with those who had made themselves answerable by their negligence or fraud, or if the corporation is still under the control of those who must be the defendants in the suit, the stockholders, who are the real parties in interest, will be permitted to file a bill in their own names, making the corporation a party defendant." Ang. & Ames Corp. (11th ed.), § 312.

Mr. Pomeroy in his work on Equity Jurisprudence, section 1095, states the rule as follows: "Wherever a cause of action exists primarily in behalf of the corporation against directors, officers and

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others, for wrongful dealing with corporate property or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by, and in the name of the corporation, and the corporation, either actually or virtually, refuses to institute or prosecute, such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders."

These principles of equity jurisprudence have been well considered, and applied in a number of adjudicated cases. The following are some of them: *Brewer v. Boston Theatre*, 104 Mass. 378; *Peabody v. Flint*, 6 Allen, 52; *Robinson v. Smith*, 3 Paige, 222; s. c., 24 Am. Dec. 212; *Pond v. Railroad*, 12 Blatchf. 280; *Detroit v. Dean*, 106 U. S. 537; *Hawes v. Oakland*, 104 U. S. 450. The relief awarded is often of a preventive character, and in many cases, the officers have been required to account for a breach of the trust reposed in them, and for the misapplication of the funds and property of the company. If other parties have participated with the officers in such proceedings, they may be joined as defendants, and held to their just responsibility; and property of the company may be followed into their hands. *Peabody v. Flint*, *supra*; *Russell v. Wakefield Waterworks Co.*, L. R., 20 Eq. 474.

But in all these cases, the defaulting directors or officers were made defendants, and the suits were primarily against them. That the suit must be primarily against them is also the deduction to be made from the above extracts from the text-books. The relief, when awarded against other persons, flows incidentally from their complicity with the officers in the wrong complained of. No officers of the plaintiffs' corporation are parties to this suit. It is simply a suit against the debtor company only, to collect a debt or damages due to the dispatch company, and we do not understand that a suit for such a purpose only comes within the exceptions of the general rule before stated. If these managing officers were sued for the abuse of the trust imposed upon them as officers, they might possibly assign a good reason why the suit should not be brought, and why the affairs of the corporation should not be taken out of their hands. They are the proper persons to show, if they can, why the management of the affairs of the company should not be taken out of their hands, as must be done to sustain this suit.

The case specially cited by the plaintiffs, as giving them a right to prosecute this suit, is that of *Hawes v. Oakland*, 104 U. S.

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450. There a stockholder filed his bill against the company, the directors thereof, and the city. The complaint was that the city demanded, without compensation, water for certain municipal purposes, to which demand the company yielded, to the great loss of the company, the complainant, and the other stockholders. The conclusion is there reached, that in the State courts, the right of a stockholder to sue in cases where the corporation is the proper party to bring the suit is limited to cases where the directors are guilty of fraud, or a breach of trust, or are proceeding *ultra vires*. The enumeration of the different cases there made, in which such suits may be brought, certainly does not include the one in hand. Mr. Justice MILLER, who prepared that opinion, refers to *Samuel v. Holliday*, Woolw. 418, where after reviewing *Dodge v. Woolsey*, 18 How. 331, he says: "But no case is cited, nor does any *dictum* in that opinion go to the length of asserting that when a corporation has been injured by a tort, or a breach of a contract, or has any right of action, legal or equitable, against a party, an individual stockholder can come into court and prosecute that cause of action, because the corporation fails or refuses to do so." These authorities are in entire accord with, and in confirmation of the conclusions before stated.

If the matters stated in the petition are true, the plaintiffs have a complete remedy under sections 948-9, Revised Statutes, and when a receiver is appointed that officer of the court will stand invested with authority to sue for all demands and debts due to the company. This result renders it useless to discuss the other questions raised by the demurrers. We may say, in conclusion, that we are all agreed that from the statements of the petition, the new transportation company is liable for the debts of the old transportation company; certainly, to the full extent of the value of all of the property received from the old company.

The judgment of the Circuit Court is therefore affirmed without prejudice.

All concur.

Judgment affirmed.

EX PARTE MARMADUKE.

(31 Mo. 233.)

Constitutional law — production of witness convicted of felony.

A statute prohibiting the production on *habeas corpus*, as a witness, of any person imprisoned under sentence for felony is constitutional, although such person may be a competent witness.

PETITION for *habeas corpus*. The writ was discharged below.

B. G. Boone, attorney-general, for petitioner.

T. B. Harvey, contra.

NORTON, C. J. On the 27th day of January, 1887, the St. Louis Criminal Court caused to be issued and served on petitioner the following writ:

“CITY OF ST. LOUIS, ss. :

“The State of Missouri to Darwin W. Marmaduke, warden of the Missouri State penitentiary at Jefferson City, Missouri — Greeting: We command that you do, on Monday, January 31, 1887, at 10 o'clock, A. M., without excuse or delay, bring or cause to be brought before the honorable St. Louis Criminal Court, the body of Frederick Whitrock, by whatever name or addition he is known or called, who is detained in your custody as it is said, then and there to testify as a witness in a cause wherein the State of Missouri is plaintiff and David S. Frothingham is defendant, and have with you this writ, return indorsed thereon, and herein fail not at your peril. Witness, Patrick M. Staed, clerk of said court, and the seal thereof, at the city of St. Louis, this 26th day of January, A. D. 1887.

[SEAL.]

“PATRICK M. STAED, *Clerk.*”

To this writ the petitioner made the following return:

“STATE OF MISSOURI, }
County of Cole, } ss. :

“Now comes Darwin W. Marmaduke, warden of the Missouri State penitentiary, and for return to the within writ says that he respectfully declines to comply with said writ by producing or having the body of said Frederick Whitrock before the said Crimi-

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nal Court, as in said writ directed, for the reason, that as such warden or otherwise, he has no legal authority to remove the body of said Whitrock from the State penitentiary wherein said Whitrock is now confined under and by virtue of a judgment and sentence of said St. Louis Criminal Court under a sentence for a felony.

"Done at the city of Jefferson, Missouri, this the 29th day of January, 1887.

"DARWIN W. MARMADUKE,
"Warden Mo. State Penitentiary."

Upon the above being made the said Criminal Court on the 31st day of January, 1887, issued its writ of attachment, directed to the sheriff of Cole county, commanding him to arrest the petitioner and have his body before said Criminal Court on the 3d day of February, 1887, to answer as for contempt in not obeying the first writ issued. The said petitioner was arrested by said sheriff by virtue of this writ and is by him held in custody, and it is from this imprisonment that petitioner seeks to be discharged by the writ of *habeas corpus*, issued and served on said sheriff on the first day of February, 1887. The right of defendant to be discharged is mainly dependent on the question whether section 4031, Revised Statutes, is or is not a valid law. The section is as follows:

"Courts of record, and any judge or justice thereof, shall have power, upon the application of any party to a suit or proceeding, civil or criminal, pending in any court of record or public body authorized to examine witnesses, to issue a writ of *habeas corpus* for the purpose of bringing before such court or public body any person who may be detained in jail or prison within the State, for any cause except a sentence for felony, to be examined as a witness in such suit or proceeding on behalf of the applicant."

This identical statute is found in the Revised Statutes of 1835, § 11, page 623. It is also found in the revision of 1845, page 1089, § 13; also in the revision of 1855, vol. 2, § 24, page 1582; also in the General Statutes of 1865, § 22, page 588, and is carried into the Revised Statutes of 1879 as section 4031. It will be thus seen that the law now assailed as being unconstitutional has remained on the statute books of the State unchallenged, so far as the judicial records of the State show, for more than fifty years. By way of answer, it is stated in the brief, and was so orally argued by respondent's counsel, that previous to and up to 1879 most persons

who were convicted of felonies were rendered incompetent to testify as witnesses, and that the section in question forbidding persons convicted of felony from being taken from the penitentiary on a writ of *habeas corpus ad testificandum* into court for the purpose of being examined as witnesses, was intended to apply to that class of felons who were disqualified as witnesses.

This is no answer for two reasons: First, because if the statute meant only this, there existed no reason whatever for its passage, inasmuch as without such statute it is not to be presumed that any court would issue a writ of *habeas corpus* to bring before it a person convicted of a felony to testify, who when brought could not testify, by reason of such conviction disqualifying and rendering him incompetent as a witness in any case. It has grown into a maxim that a court will not do a useless thing, and it cannot be presumed that it was the intention of the legislature, in the passage of this statute, to forbid the courts from issuing this writ, when they could not have issued it without stultifying themselves. This writ of *habeas corpus ad testificandum*, under any practice, either in this country or England, never issued, except to bring a witness, competent and qualified to testify when brought, and never to bring a person who could not testify when brought, by reason of his being disqualified as a witness. The second reason is, because while the above construction contended for gives no force to the statute, there is another construction which is reasonable and gives force and efficacy to it. It is this: that previous to 1879, under our Criminal Code, a very great number of persons, who were convicted of certain classes of felonies, were not rendered, by reason of such conviction, incompetent to testify as witnesses, and it does no violence to reason to hold that it was the intention of the legislature, in enacting the section in question, while broad enough to include all who were under sentence for felony, to make it peculiarly apply to that class of felons who were not, by reason of their conviction, disqualified as witnesses.

Section 9, article 13, of the Constitution of 1820, and section 18, article 1, of the Constitution of 1865, provide that "in all criminal prosecutions the accused has the right * * * to have compulsory process for witnesses in his favor." In the Constitution of 1875, section 22, article 2, it is provided that "in all criminal prosecutions the accused shall have the right * * * to have process to compel the attendance of witnesses in his behalf." The

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learned counsel for respondent insists that the change of the words, as found in the Constitutions of 1820 and 1865, "to have compulsory process for witnesses in his favor," to the words as found in the Constitution of 1875, "to have process to compel the attendance of witnesses in his behalf," has worked such a change as to give some additional right to a person criminally charged, which he did not have under the Constitutions of 1820 and 1865, and a change so radical as to bring said section 4031 in conflict with the Constitution, and operate as a repeal of it. While there is a change in verbiage, a change in the form of expression, the phrase, as used in the Constitutions of 1820 and 1865 means the same thing as that which is used in the Constitution of 1875.

Compulsory process, for a witness, signifies and means a process that will compel the attendance of such witness, a process that will bring a witness into court who refuses to come without it. And nothing is added to the force of a provision which gives the accused the right to have compulsory process for witnesses in his favor, by changing the form of expression so as to give him the right to have process to compel the attendance of witnesses in his behalf. Both forms of expression convey to the mind precisely the same meaning. In the Constitutions of 1820 and 1865, the form of expression that the accused "has the right" to have compulsory processes for witnesses in his favor, was changed in the Constitution of 1875, so as to read, "shall have the right to process to compel the attendance of witnesses in his behalf," and it might as well be argued that the change of the words "has the right" to the words "shall have the right," and the change of the words "witnesses in his favor," to "witnesses in his behalf," altered the meaning of the section, as to argue that the meaning of the section, as contained in the Constitutions of 1820 and 1865, to have compulsory process for his witnesses, was either altered or enlarged by changing the form of expression so as to read, "to have process to compel the attendance of witnesses."

It therefore follows, from what has been said, that if section 4031 is invalid under the Constitution of 1875, it was also invalid under the Constitutions of 1820 and 1865. And although it stood on the statute books of the State for thirty years before the Constitution of 1865 was framed, and forty years before the Constitution of 1875 was framed, the framers of those Constitutions did not make the discovery that it was invalid, nor provide against it,

nor has it been as before stated assailed till now. I do not make this statement to give color, or countenance, to the idea that an act of the legislature, which is unconstitutional at its inception, is rendered valid by having remained on the statute book, unassailed, for more than half a century, or to the idea that such a statute ought not, because of its antiquity, to be declared void; but to deduce from its non-assailment for so long a time the presumption that its unconstitutionality is neither so apparent nor clear as counsel contend it is, or else it would not in all probability have been re-enacted through a long series of years, or remained free from attack. But casting aside this presumption, we are of the opinion that the statute in question is valid. The Constitution, which confers upon a person criminally charged the right to compulsory process for witnesses, also declares and casts upon the legislature the duty and power of enacting laws for the punishment of crimes, and in the exercise of this power, laws have been enacted, providing that persons convicted of certain felonies shall be punished by imprisonment in the penitentiary for a term of years, in no case less than for two years. The effect of these laws is to bring together in one place this criminal class from all parts of the State, and aggregate them into a community separate and distinct from all others, and now numbering about 1,600 persons. For such as these, composed in the main of lawless and desperate men, with all their civil rights suspended during the respective terms of their imprisonment, as declared by section 1667, Revised Statutes, provision must be made for their safe keeping, and regulations made for their government and control, and to accomplish these ends this class of persons have been put by the legislature under the control and management of a warden, deputy warden, guards, etc., and confined in a place called the penitentiary, with strong walls guarded by armed men to prevent their escape in the daytime, and with secure cells in which they are locked at night. We do not believe that the legislature, in the exercise of the right to make regulations for the government of this class of convicts, transcended its power by providing, as has been done by said section 4031, that the warden having them in custody should not be required to take such convicts and surrender them to the various courts of the State to testify as witnesses. Such a regulation we do not regard as unreasonable, but as one proper to be made in view of the fact that the thing prohibited, if allowed to be done, would interfere with

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the government of such convicts by affording them facilities for escape, and for the time being put it out of the power of the warden, the chief and controlling officer of the penitentiary, to exercise that supervisory control so essential to the management of such a community of persons put by law in his charge, and besides this it would place the convict in such position that it would be in his power to exchange imprisonment in the penitentiary with hard labor, to simple imprisonment in a county jail without labor, by his refusal, when produced in court to answer proper questions, or to testify at all, in either of which events the court could commit him to the jail of the county.

This is not an argument *ab inconvenienti*, but is made for the purpose of showing that the regulation, made by said section 4031, is a reasonable and proper regulation, and therefore one within the power of the legislature to make, and that the right given to those criminally charged is, to that extent, subordinated to the power conferred upon the legislature over this class of persons. The power of the legislature to provide a penitentiary in which all persons from every portion of the State, who are or may be convicted of certain felonies, are to be confined, carries with it, necessarily, the power to make such regulations for their government and detention therein as are reasonable and in its judgment necessary to keep them safely where the sentence of the court puts them. The power of the legislature, to provide that all persons convicted of felony shall forever be disqualified, is undisputed, and inasmuch as the greater includes the less, their power to provide that such persons shall not, for the time they are undergoing sentence of imprisonment in the penitentiary, be taken therefrom into the various courts of the State, logically follows and is equally indisputable, and said section 4031 does nothing more than this. The sacred right of one criminally accused to have process to compel the attendance of his witnesses stands upon the same footing of other rights conferred and secured by the Constitution, and all of them are equally sacred and should be construed alike and with reference to each other so as to avoid conflict.

The Constitution provides that private property shall not be taken for private use, but notwithstanding this we have a statute which requires railroad companies to pay to the owners of stock killed on their roads, by reason of their failure to erect fences along the sides of their road, not only the actual damage sustained, but

double the amount of such damage, which is, to that extent, a taking of private property for a private use, and although the Constitution forbids this being done, the statute has been held to be valid in several decisions of this court, notably so in the case of *Humes v. Railroad*, 82 Mo. 221, the judgment in which case was, on appeal to the Supreme Court of the United States, affirmed. In that case twenty or thirty statutes, which have long stood upon the statute book, are grouped together in which double and triple damages are allowed in the classes of cases specified. And what is there said with reference to these statutes may be applied to the one under consideration. "Some of these statutes are old and historic. They are inwoven with the legislative policy of the State. Their long continuance justifies the presumption that the people and their law-makers have found them preservative of the public welfare and a shield of just protection to private property. Why therefore in respect to the constitutional provision under consideration, and others invoked in this appeal, should the framers of the Constitution of 1875, representing, as they did, the whole sovereignty of the people, intend by the general language employed to sweep away all these sanctioned legislative enactments? * * * Is it not reasonable to assume, that had it been in the mind of the framers of the Constitution to strike so deep into the body of the legislative branch of the government, that they would have done so by the employment of words so direct and pertinent as to have made the purpose unmistakable?"

It is provided in the Constitution that when private property is taken for public use and the owner thereof is damaged thereby, that compensation therefor shall be made by the payment of the same to him, or into court for him, before his proprietary rights shall be disturbed. In the case of *Railroad v. Evans*, 85 Mo. 307, certain sections of the statute, relating to condemnation proceedings, were drawn in question as being in conflict with the constitutional provision above referred to, and the court, speaking through Mr. Justice SHERWOOD, in effect said, that Constitutions are instruments of a practical nature, to be construed with the help of common sense; that "it would be doing violence to all known rules of interpretation to assume that those who framed, or those who by their votes adopted our Constitution, were actuated by no intelligent purpose in that behalf. On the contrary, it must be assumed that they were familiar with the vicissitudes incident to condemnation

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proceedings and with the statutory provisions relating thereto." And it is further said, "As the legislature has revised the general law in regard to condemnation of land, it will be presumed that their attention was directed to the subject of the necessity of conforming that law to the constitutional provisions, and such revision must be regarded as a legislative construction of that section of the Constitution under consideration, and that the general law is in conformity thereto. * * * This legislative exposition is entitled to some weight, as the authorities show, and the courts may, with some confidence, repose upon the conclusions reached by the legislature, and the statute is to be reviewed *pro hac vice*, in the same light as though the legislature had enacted a new statute in compliance with constitutional requirements, and had prescribed by law the manner in which compensation for land taken shall be ascertained. * * * *Prima facie*, this law is constitutional, * * * and conforms, in all essential particulars, to the organic law, and the well-known rule of construction applies here, that a statute is not to be presumed repugnant to the Constitution, until such repugnancy is made to appear beyond a reasonable doubt. * * * 'As a conflict between the statute and the Constitution is not to be implied, it would seem to follow, where the meaning of the Constitution is clear, that the court, if possible, must give the statute such a construction as will enable it to have effect.' "

In the case before us, said section 4031 was enacted in 1835, and was a legislative construction of the Constitution of 1820, in regard to compulsory process for witnesses. So it was thus construed by the re-enactment of the section in 1845 and 1855. So it was thus construed in 1865, under the Constitution of 1865, and also on the Constitution of 1875, by the revision of 1879. So that if a single legislative construction of the Constitution was entitled to weight in considering the question involved in the case above cited, that weight is greatly increased when the same legislative construction has been put on a clause of the Constitution for more than fifty years, and by five legislatures, at the end of each decade of ten years. So in the case of *State v. Whitten*, 68 Mo. 92, the court held, speaking through SHERWOOD, J., that it was in the discretion of the court to limit the number of witnesses to be heard on an issue pending upon an application for a change of venue in said case, although it would seem that the constitutional provision, giving process to compel the attendance of witnesses, was broad enough

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papers which are not evidence in the cause to be let in for any purpose whatever. It is said that this was offered merely for the purpose of trying the knowledge of the witness, but the inquiry would not stop there."

In *Doe dem. Perry v. Newton*, 5 A. & E. 514, where the issue was as to the genuineness of a signature to a will produced by the defendant, the plaintiff's counsel, on cross-examination of one of defendant's witnesses, put into his hand some letters which witness said he believed to be of the testator's writing. On behalf of the plaintiff it was proposed to submit the letters to the jury that they might compare them with the disputed signature and thereby judge both of its genuineness and of the credit due to the witness. The letters were not in evidence for any other purpose and were excluded, and this ruling was affirmed. See also *Doe dem. Mudd v. Suckermore*, 5 A. & E. 703.

In *Massey v. Bank*, 104 Ill. 327, the bank sued Massey on a note. For the bank a witness testified that some years before he had seen Massey write, and that it was his impression that the signature of the name of Massey to the note was in his handwriting. On cross-examination, defendant's counsel handed the witness a paper having written on it the name "H. E. Massey" sixteen times, and asked the witness to point out the genuine signatures, if any there were. It was then contended that the evidence was proper on cross-examination, but the court held that the evidence was properly excluded.

Extrinsic signatures, offered to be used on cross-examination, were held to have been properly excluded in *Bank v. Robert*, 41 Mich. 710.

The rule which excludes extrinsic papers and signatures is substantially the same in the direct and cross-examination as will be seen from the foregoing authorities. Papers not a part of the case, and not relevant as evidence to the other issues, are excluded mainly on the ground that to admit such documents would lead to an indefinite number of collateral issues, and would operate as a surprise upon the other party, who would not know what documents were to be produced, and hence could not be prepared to meet them. The reason of the rule applies to the cross-examination with as much force as to the direct examination. The signatures should have been excluded, whether used to test the witness as an expert, or to test his knowledge of the handwriting of the plaintiff.

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We cannot say the evidence did no harm. The error was in the reception of evidence on the only disputed fact in the case, and the judgment must be reversed and the cause remanded. It is so ordered.

NORTON, C. J., and SHERWOOD, J., absent. The other judges concur.

Judgment reversed and cause remanded.

NOTE BY THE REPORTER.—See *Nat. Bk. of Chester Co. v. Armstrong*, 66 Md. 118; a. c., 59 Am. Rep. 156.

In *Massey v. Farmers' Nat. Bank of Virginia*, 104 Ill. 327, the court said: "One Gatton, a witness for plaintiff, testified that some years before, he had seen Henderson E. Massey write, and that it was his impression that the signature of the name of said Massey to the note in question was in his handwriting. After then stating on cross-examination that it was six or seven years since he had seen Massey write, and that he did not know whether he would know his signature now, and did not know that 'he could pick out his signature in the bank,' defendant's counsel handed the witness a paper having written on it the name 'H. E. Massey,' sixteen times, and asked the witness to point out the genuine signatures, if any were genuine. The court excluded the question, and exception is taken to this. It is urged that this question was proper on cross-examination for the purpose of testing the knowledge of the witness, and as authority, therefor reference is made to 1 Whart. Ev., § 710, where the author says: 'There is little question that a witness may, on cross-examination, be tested by putting to him other writings not admitted in evidence in the case, and asking him whether such writings are in the same hand with that in litigation.' Without stopping to inquire as to the general correctness of this observation, and especially where the rule obtains, as in this State, that evidence or the genuineness of handwriting, based on comparison of hands, is not admissible, we think that at least with reference to test papers got up for the occasion, as in the present case, there was no error in not allowing the course of cross-examination proposed. The same author, further on in section 715, remarks: 'We have already seen that a party cannot make testimony for himself by writing specimens for the instruction of witnesses afterward to be called as to his handwriting. By the same reasoning a party cannot be permitted to get up in this way test papers to be used subsequently for comparison of hands.' And although the paper here offered was not to be used professedly for comparison of hands, we think its admission for the purpose declared would be alike objectionable. See *Griffiths v. Ivery*, 11 A. & E. 323, and *King v. Donahue*, 100 Mass. 155. In the former case, where there was the disallowance of a like course of cross-examination for the purpose of testing the witness' knowledge, COLERIDGE, J., said: 'We must not allow papers which are not evidence in the cause to be let in for any purpose whatever.'"

In *First Nat. Bk. v. Robert*, 41 Mich. 709, it was held that a defendant, whose signature is in dispute, may not be required on cross-examination to write his name for the purpose of comparison.

Kraxberger v. Rotter.

KRAKXBERGER V. ROTTER.

(91 Mo. 404.)

Marriage—breach of promise—rescission.

In an action for breach of promise of marriage, the breach being proved, it is no defense that the plaintiff subsequently gave up her engagement ring to the defendant.

ACTION for breach of promise of marriage. The opinion states the case. The plaintiff had judgment below.

A. W. Anthony, for plaintiff in error.

Draffen & Williams and *D. E. Wray*, for defendant in error.

BRACE, J. Action for damages for breach of promise to marry. Defendant admitted the engagement and pleaded a release. The jury found a verdict for the plaintiff for \$3,000. The following is all the evidence in the case that it will be necessary to consider in passing upon the errors complained of:

Plaintiff testified: "We were engaged about three months when he commenced to break off the engagement by letters. At first I could not believe that he meant what he wrote, and wrote him for an explanation. When I learned he was in earnest it almost made me crazy. I could not eat or sleep. I came to Missouri; went to Uncle Mike's; stayed all night; next morning went to see the defendant. He treated me very cool and would scarcely speak to me; he said it was time to break off the engagement; he said his feelings were changed and that he could not marry me; that he loved another woman; that he loved her before he met me. I took off the ring he had given me and gave it up to him, and told him he did not talk that way when he courted me and won my love and told him the way he had treated me had broke my heart. I did not know what I was doing when I gave him the ring; he said he had written to me and told me what the reason was; he then hung his head down and would not talk to me any more; I then left the room and told him I would see him again; I went to see him because I could not believe what he had written in his last letters, as it was so different from what he had said and written before; I have his letters." The letters were read to the jury, but not embraced in the bill of exceptions.

Kraxberger v. Roiter.

[Minor points omitted.]

Defendant in his own behalf testified: "I wrote the letters read in evidence; I referred to another lady in one of those letters; I was engaged to her before I was engaged to plaintiff; I thought I had got over my love to her, and told plaintiff so before we were engaged, but found I had not, and changed my mind about marrying plaintiff, and wrote to plaintiff immediately; she came to my father's house to see me; I told her how it was; that I could not marry her with a clear conscience, and she offered me the ring, our engagement ring, and some other presents I had made her; I did not take them, but told her she could keep them; she laid them on the bureau and left them; when she left she said she would see me again about it; we had no more conversation." On cross-examination he said: "I conveyed the impression to her that it would be wrong for me to marry her; I told her I had become convinced I could not marry her while I loved this other lady; this was before she handed me the ring; I told plaintiff's uncle the day we had the talk that I would not marry the plaintiff."

Miss Roiter, sister of defendant, testified in his behalf: "I saw the plaintiff when she came out of the room after the conversation with the defendant at my father's house; she told me that defendant did not love her any more, and that if he did not love her she did not want him; she was crying at the time, and went away from our house crying."

We deem it unnecessary to set out the instructions given and refused in this case, for the reason, that as we view the evidence, there was but one question to be submitted to the jury, and that was the amount of the damages, and the instruction given by the court on that subject was unobjectionable. The contract of the defendant and his refusal to perform it was admitted, and there was no evidence tending to show that the contract was rescinded by agreement of the plaintiff, or that she ever released her action thereon for damages for its breach. On the contrary, the uncontradicted evidence of both parties, and there is no conflicting evidence in the case, was to the effect that the defendant, during the pendency of the engagement, having transferred his affection, the sole basis upon which such a contract should rest, to another, without in any manner consulting the feelings or the wishes of the plaintiff, informed her first by letter that he had changed his mind about marrying her; that he loved another, and afterward, when

scarcely crediting the fact which had thus been communicated, she comes from Illinois to Missouri and seeks an interview with him in order that she might learn certainly what was his disposition and intention toward her, he again informs her that he loves another and will not marry her. Fully realizing then that she had indeed lost the love that he had once assured her was hers, and upon the faith of which she had engaged herself to him, and that his determination not to marry her was final and conclusive, she takes from her finger the engagement ring, once given her as a token of his sincerity and fidelity, now a memento only of his fickleness and treachery, and in her express words, "gave it up to him," and went crying from his presence. This forsooth is claimed to be evidence that the plaintiff agreed to rescind the contract and release the defendant from the obligations thereof. The giving up by plaintiff of her engagement ring thus wrung from her by the action of the defendant is to be tortured into an agreement to rescind a contract which the defendant had already refused to perform, and to the performance of which he interposed an insuperable barrier in the mind of the defendant, as it would be in the mind of every true woman into an agreement to rescind the contract that she was never asked or afforded an opportunity to rescind.

The defendant, by his own action, had left her no choice in the matter; nothing that she could do but accept the situation he made for her, abandon all hope of the marriage, give up the symbol of that hope, and seek such compensation in damages as the law could give her for the injury she had suffered, without fault on her part, at the hands of the defendant, and this, the only remedy left her, she seeks in this case, her damages, having been assessed, under proper instructions, by a jury, whose verdict there is nothing in the record even to suggest was in any way affected by passion or prejudice; there was no error in the refusal of the court to give any of the instructions asked for by the defendant, and those given presented the case to the jury even more favorably to the defendant than he could have asked upon the evidence, upon which the court might have well instructed the jury that there was no evidence tending to prove a release, as pleaded.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

All concur, except NORTON, C. J., absent.

PRITCHARD V. HEWITT.

(91 Mo. 347.)

New trial — smallness of damages.

A new trial will not be granted in an action for assault merely on the ground of the smallness of the damages awarded.

ACTION for assault. The opinion states the case. The plaintiff had judgment below.

S. G. Loring, for plaintiff in error.

Ramey & Brown, for defendant in error.

BRACE, J. This was an action commenced by the plaintiff in the Circuit Court of DeKalb county, to recover damages of the defendant for maliciously assaulting, shooting and wounding the plaintiff, which resulted in a verdict for the plaintiff for \$1. The defense was *son assault demesne*. After an unsuccessful effort for a new trial, the plaintiff, having saved his exceptions, brings the case to this court by writ of error, and assigns for error: (1) That the court refused to give the instructions numbers seven and eight for plaintiff; (2) that the court gave the instructions asked for the defendant; (3) that the court overruled plaintiff's motion for a new trial.

The refused instructions numbered seven and eight, asked for by the plaintiff, and the instruction given by the court for the defendant, were all upon the issue joined upon defendant's plea, that plaintiff first assaulted him, and that in resisting that assault, he used no more force than was necessary to resist such assault, and protect himself from great personal injury, and as that issue was found for the plaintiff by the jury, no harm resulted to him from the action of the court in that behalf, even though it be conceded that plaintiff's refused instructions were correct, and that the one given for the defendant is obnoxious to the criticism placed upon it. The action of the court in giving the one and in refusing the others would therefore be no ground for reversal. *Gregory v. Chambers*, 78 Mo. 294; *Morris v. Railroad*, 79 Mo. 367.

On the *quantum* of damages for plaintiff, the court gave the following instruction:

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"If the jury find for the plaintiff, in estimating his damages, they will take into consideration the physical injury inflicted, and the bodily pain and mental anguish endured, together with the loss of time occasioned, and all expenses incurred, shown by the evidence, in and about the treatment of his case, also any and all such damages which it appears from the evidence will reasonably result to him from said injuries in the future."

The plaintiff insists that a new trial should have been granted, for the reason that the jury disregarded this instruction in the assessment of his damages at \$1. The rule is, that in personal actions founded upon tort and sounding merely in damages, a new trial will not be granted on the sole ground of smallness of damages. Mr. Graham, in his work on New Trials, after stating the rule and reviewing the cases, thus states his reason for the rule: "The reason for holding parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of a jury governed by a sense of justice. * * * To the jury therefore as a favorite and almost sacred tribunal is committed, by unanimous consent, the exclusive task of examining the facts and circumstances, and valuing the injury and awarding compensation; in damages. The law that confers on them this power, and exacts of them the performance of this solemn trust, favors the presumption that they are actuated by pure motives, * * * and it is not until the result of the deliberation of the jury appears in a form calculated to shock the understanding, and impress no dubious conviction of their prejudice and passion, that courts have found themselves compelled to interpose." 1 Graham and Waterman New Trials (2d ed.), 451.

The rule has been adhered to in the more recent cases that have come under our observation, and has been recognized approvingly in *Gregory v. Chambers*, 78 Mo. 294, and in *Watson v. Harmon*, 85 Mo. 413, and the principle upon which it is founded sanctioned by very many cases decided by this court where new trials have been refused in cases where reversals have been asked on the ground of excessive damages. Of course, it goes without saying that actions *ex delicto*, wherein the damages may be measured with some degree of certainty, are not within the rule, and that those cases where the damages, under the circumstances, are such as to shock the

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"understanding," and induce the conviction that the verdict was the result of either passion, prejudice, or partiality, are exceptions to this rule. The case under consideration is clearly within the rule; no standard is furnished in the evidence by which this damage would be measured with any reasonable degree of certainty, and nothing in the case to warrant the conclusion that the verdict was the result of passion, prejudice, or partiality. The jury were of the vicinage of the parties, and doubtless acquainted with both the parties and the witnesses. It was their exclusive province to weigh the evidence and pass upon the credibility of the witnesses. They and the learned judge who refused to grant a new trial had better opportunities of seeing the transaction in its true light and colors, than we have in the record before us. Nevertheless, in that record, we can see how the jury might well, from the evidence, have found that although the defendant was not justified in his action, yet that the plaintiff also was not without fault, and come to the conclusion that under all the circumstances, it was not a case for substantial damages. It is not a case of that flagrant character that would warrant the intervention of an appellate court.

The judgment of the Circuit Court is affirmed.

All concur.

Judgment affirmed.

CHIDSEY V. POWELL.

(91 Mo. 622.)

Statute of limitations — acknowledgment.

An acknowledgment that a debt exists, without any promise to pay or expression of willingness to remain bound, will toll the statute of limitations, in the absence of conditions or circumstances rebutting the presumption of an intention to pay.*

ACTION on a promissory note. The opinion states the case. The plaintiff had judgment below

Goode & Cravens, for appellant.

J. P. McCammon, for respondent.

* See *Richardson v. Bricker* (7 Colo. 58), 49 Am. Rep. 844.

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BLACK, J. This suit was begun in the Greene county Probate Court, and is founded upon a promissory note dated October 1, 1871, and signed by Wm. Addis, whereby he promises to pay Wm. Chidsey, the plaintiff, \$250 in one year after the date thereof. The executor, as a defense, interposed the statute of limitations. To avoid the bar of the statute the plaintiff, on the trial anew in the Circuit Court, read in evidence the following letter shown to have been written by the deceased :

"OXFORD, BUTLER CO., OHIO, *March 30, 1876.*

"*Dear Brother Chidsey :*

"Your letter came to hand, but I have mislaid it somehow, and cannot lay my hand on it any more. * * * And now, brother, I must say to you something about money matters. I am very sorry that I cannot comply with your request to let you have some part of the debt I owe you; but let me say to you for the last three years I have had bad luck from the failure of fruit. Last year at this time the orchards had the appearances of a greater crop up to the night of the thirteenth, when the frost killed every thing — put at least \$1,000 out of my pocket. And now there is a fair prospect for a good crop of apples, and some peaches, but all may be killed. Young bushes, corn, and oats, and wheat, was badly injured by so much rain. I hope it will be better this year, and I do not know what we farmers will do. My kind love to your family, and believe me, as ever,

"Your friend and brother,

WM. ADDIS.

"*April 4* — Bob was here to-day, but I had to disappoint him. I am sorry; and cannot see now when I can pay any.

WM. A."

The defendant asked and the court refused the following instructions:

"2. The letter of deceased, read in evidence by plaintiff, does not constitute a sufficient acknowledgment of the debt to take the case out of the statute.

"3. The letter having been written prior to the statutory bar of the note and while said note was of itself in full force, cannot be relied upon to take the case out of the statute."

1. As to the third instruction it is sufficient to say that we recently held in the case of *Martin v. Branham*, 86 Mo. 644, that

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an acknowledgment to take the debt out of the statute, may be made before the debt is barred; that when the acknowledgment is thus made before the debt is barred, the statute will begin to run from the time of the acknowledgment.

2. There is no question but the letter of Addis read in evidence, related to the note in suit, so that the real question is, does that letter contain such an acknowledgment as will avoid the plea of the statute of limitations. In view of the many conflicting decisions upon this subject, it is well to keep in view our statute, which in substance is, that no acknowledgment or promise shall be evidence of a new or continuing contract, whereby to take any case out of the operation of the statute, unless such acknowledgment or promise be made or contained by, or in some writing subscribed by the party chargeable. It is to be observed in the first place, it is not necessary to show an express promise; an acknowledgment will be sufficient. What then are the essential elements of the acknowledgment to make it effectual? In the case of *Elliot v. Leake*, 5 Mo. 209, it was said: "It is not necessary that the party should acknowledge a willingness to pay the debt; it is sufficient that he acknowledged that he owed the debt, and that it remained unpaid. That evidence which will create an obligation will revive that obligation, if connected with evidence that the obligation has not been discharged." To the same effect is the case of *Boyd v. Hurlbut*, 41 Mo. 264. But if the acknowledgment is accompanied with conditions, or circumstances which repel or rebut an intention to pay, then it will not be sufficient to defeat the bar of the statute. *Boyd v. Hurlbut*, *supra*; *Martin v. Branham*, *supra*; *Chambers v. Rubey*, 47 Mo. 99. The presumption of a promise to pay, arising from an acknowledgment, is from such circumstances destroyed.

From these adjudications it is clear that an acknowledgment of a debt and that it remains unpaid, though there is no expression of willingness to remain bound, will avoid the bar of the statute of limitations, unless accompanied with conditions, or circumstances which rebut or repel an intention to pay. In the present case the deceased, by the letter, when speaking of the note in suit, says of it, "the debt I owe you." There is here an unequivocal admission and acknowledgment of an actual subsisting debt. This is clear beyond all doubt. He then expresses his inability to pay any part of the debt at that time, and proceeds to give his reasons therefor.

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Instead of saying any thing showing an intention not to pay the debt, he expresses a regret of his inability to then pay it, or any part thereof. We see nothing in the letter indicating a purpose not to pay, or that is inconsistent with the promise to pay, arising from the acknowledgment. The only thing left uncertain by the letter is as to when he could pay the note, but that uncertainty does not destroy the effect of the unequivocal acknowledgment of an existing debt. *Warlick v. Peterson*, 58 Mo. 408.

[Minor points omitted.]

The judgment is, with the concurrence of the other judges,
 affirmed. *Judgment affirmed.*

SHARKEY v. McDERMOTT.

(91 Mo. 647.)

Contract — to provide for adopted child by will.

An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property upon their death.*

THE opinion states the case. The defendant had judgment below.

M. F. Taylor, for appellant.

Broadhead & Haessler, for respondent.

RAY, J. This action was disposed of, upon a demurrer to the petition, which is of considerable length, and appears in full in the opinion of the St. Louis Court of Appeals, 16 Mo. App. 80. The correctness of the ruling of the trial court in sustaining the demurrer, and entering judgment thereon in favor of the defendants, which was afterward affirmed in the Court of Appeals, is the only question now involved in the case.

We are not able to concur in the view of the petition, and of plaintiff's right, as therein declared, adopted and entertained by said courts. In the first place, the statute of frauds, we apprehend, cuts no figure in the case, for the reason that it appears plaintiff

* See *Wall's Appeal* (111 Penn. St. 460), 56 Am. Rep. 288.

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has fully performed the contract on her part, and the same has also been performed in part by the other parties thereto, and to the extent of providing for and maintaining plaintiff during said years. *Gupton v. Gupton*, 47 Mo. 37; *West v. Bundy*, 78 Mo. 407; *Anderson v. Shockley*, 82 Mo. 250.

Besides this, it is not stated in the petition that the alleged agreement was oral, but the same is declared on without stating whether it is in writing or not, and where this is so, the contract is presumed to be in writing. Browne Stat. of Fraud, § 505.

Again the fact that the suit is instituted after the death of the parties making the contract is not important, in determining the demurrer, which admits the facts stated, and from which it appears that there was no breach of the contract upon which the plaintiff could maintain any action until the death of the said parties and each of them. The death of James McLaughlin, which occurred in 1876, did not give her a right of action for the property, as by the terms of the agreement it was to be left to her at their death, and not his; so that until the death of the survivor of them, no right of action thereon existed in her favor. So far as the original contract is concerned, it is, as has been pointed out, to be taken as the contract of said James McLaughlin alone, the said Catherine being then under the disability of coverture, and whilst the petition may indicate in some of its allegations, that said Catherine and said plaintiff both supposed that plaintiff had been adopted, still it charges "that after the death of said James plaintiff still continued, under the same conditions, to live in the household of said Catherine," which means, we think, the mutual or reciprocal conditions of the original agreement, made between said James McLaughlin and the mother of plaintiff.

There are other allegations in the petition, material in this behalf, such as that the said James McLaughlin revoked the will in plaintiff's favor, as to one-half the property by said codicil, devising the whole to said Catherine, which she took under the will, and that this was done to avoid making plaintiff independent, and to secure the continuation of said services and relationship of plaintiff to said Catherine after his death; the said Catherine thereafter continued to hold plaintiff out to the world as her adopted child, and to tell her she would inherit the property, and continued to receive and appropriate the wages of plaintiff of the alleged value of \$2,500, to her own use and benefit, whilst the plaintiff on her part continued

at the same time to be obedient, dutiful and affectionate, and to do the family sewing and household labor, and such other duties as are commonly done by the child for a parent. So that although the original agreement may not have been binding upon her, by reason of her coverture at the time, yet the facts alleged show, we think, an agreement similar in substance and effect to the original, entered upon by her after becoming discoverd, upon adequate consideration, which she has held and enjoyed.

But if this were not so, yet under the facts the wife's right and title to the property, under the will of her husband, would in equity be coupled with, if not subordinate to the prior or paramount charge of plaintiff's equities thereto, under said contract with the husband. So that in any event the result is the same. As to said original agreement it clearly appears from the petition, that in January, 1862, James and Catherine McLaughlin took plaintiff, then four years of age, from her mother, then a widow, upon a promise made to her which was as alleged, "that they would provide and care well for her, and adopt her as their child, and leave her their property at their death."

As between parents and their children, a natural relation of this sort exists independent of contract between them to that effect, and similar service on the part of a child will not, it is true, give any right to a will in his favor, or to a transfer to him of his parent's property, and it may be conceded that a direct agreement to that effect might, as between them, be non-enforceable for want of consideration. A formal deed of adoption places the child adopted under the statute on a similar footing in all respects as to the person executing the deed, which the child has by law against lawful parents.

If the plaintiff has been duly adopted by the McLaughlins, as was promised, we do not see, as is held by the Court of Appeals, that under the facts disclosed her position would be that of a disinherited daughter, first by the father and afterward by the mother. So far as the father is concerned she would be thus disinherited, as his will was drawn in favor of the wife. But she would be the heir of her adopted mother, who after taking the property under the will of her husband, died intestate, and in that event plaintiff would take, under the law, as provided in the statute of descents.

But the rights of plaintiff, if any, in this case, do not spring either from the general law, applicable to parent and child, or from

said statute authorizing the adoption of children, for the reason that plaintiff was not the daughter of these parties by nature; nor had she been formally adopted by them by deed duly executed as the statute requires. Her rights in the premises, if any, depend, we think, entirely upon said agreement and the action had thereunder by the parties thereto. This agreement was not merely and solely one to adopt the plaintiff, but was in part to leave the plaintiff the property at their death. The fact that the parties, and each of them, may have failed and neglected to execute it, so far as the adoption was concerned, should not, we think, exonerate them from its further obligation to transfer their property, when they could no longer use it, to plaintiff, but if the plaintiff is without the *status* of an adopted child, through no fault of her own, but through the neglect of those so promising, this is only additional ground for the enforcement of the contract as to the disposition of the property, if the necessary equitable facts and circumstances are properly alleged.

The question then is whether this is a valid agreement executed upon sufficient consideration, and whether, being wholly performed by plaintiff, a party thereto, she is not entitled, upon the death of said James and Catherine McLaughlin, without performance thereof on their part, to a specific performance of the contract and to hold and enjoy the property so contracted for, at their death, as against these defendants, who are the brothers and sisters of the said Catherine, deceased. If such a contract may lawfully be made by the parties, then the parties defendant to this suit stand in the relation of heirs at law, if any thing, to the estate of the decedent, whilst the plaintiff, having performed the services and yielded the obedience required of her by the contract, and having fulfilled the same, has the paramount claim of a creditor, or equitable owner of the property contracted to be given her in consideration of her said services.

We see no valid and sufficient reason why the case should not be controlled by the principle and rule laid down by this court in *Wright v. Tinsley*, 30 Mo. 389; *Gupton v. Gupton*, 47 Mo. 37; and *Sutton v. Hayden*, 62 Mo. 101. In the first of said cases just cited, it is said that "on principle, there would seem to be no ground to doubt that a person may, by valid agreement, renounce the power to dispose of his property at his pleasure; may bind himself to make a will, in a particular way, on proper considerations, and that

courts of equity would enforce such agreements under proper circumstances, the same as in other cases of valid contracts." In the case at bar it was not specified in said agreement how the transfer of the property was to be made, but whilst this is true, it is, we think, immaterial, as was said in *Sutton v. Hayden*, 62 Mo. 101. "the intention to transfer the property is the chief thing, the method by which the intended result was to be attained was wholly immaterial. The contract entered into might well have been discharged by deed or will."

In *Gupton v. Gupton*, *supra*, it is said: "Contracts like the one under consideration have been before the courts, and have uniformly been held to be valid when partially performed and when the refusal to complete them would work a fraud upon the other party."

The cases of *Van Dwyne v. Vreeland*, 12 N. J. Oh. 142, and *Davison v. Davison*, 13 N. J. Eq. 246, are both very similar in their facts to the present case, and in these cases, verbal promises of the owners or their property were enforced upon the grounds that the services and support contracted for had been rendered. Under the view we have taken that plaintiff's rights, if any, depend upon the agreement entirely, the absence of a statute of adoption in New Jersey, which is commented on by the Court of Appeals, in no wise affects the authority of these decisions. The obligations of the contract in question, as of others, are mutual, but the peculiar character of agreements of this sort, it is said, all the more entitles him who has faithfully performed the service and care to his stipulated reward. *Gupton v. Gupton*, *supra*. In this class of cases it is impossible to estimate, by any pecuniary standard, the value to the recipient of the services rendered, and such services are not designed or intended to be so measured. The contract is originally so created that the consideration which the party receives cannot be returned, and after the performance of the services it is beyond the power of the party and of the courts to restore the plaintiff in such cases to the situation in which he was before the contract was made. Browne Stat. Fr., § 463.

The objection that under the facts of this case a decree for plaintiff would be in effect making a will for said Catherine, is not, we think, at all sound. This the court may not do, but it may, by its judgment under this state of facts, make effectual what the parties have themselves agreed upon, and that is the object and purpose of the petition.

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Some of the allegations in the petition would indicate its principal object or purpose to be, to obtain a decree establishing plaintiff's right of adoption, and declaring her heir-at-law of said Catherine McLaughlin, in virtue of said adoption. To that effect is the prayer for relief, but the prayer also is to declare her heir at law, by reason of the premises, and "for all other and further relief, as the facts in the case may warrant, and the court deem proper." Under our practice, if sufficient facts are stated to entitle the party to relief, the conclusions of law the pleader may draw from them, and the particular relief he may ask, may, if necessary, be disregarded, and in such cases the court may grant any relief consistent with the case made by the plaintiff and embraced within the issues. R. S., § 3683.

The case made by the petition is, we think, a meritorious and equitable one throughout. During a period of twenty years the plaintiff, who was a girl, lived with the said McLaughlins, was obedient, dutiful, and affectionate, paying these parties all the attentions due from a child to parents, and which, as was observed in *Sutton v. Hayden, supra*, "money, with all its peculiar potency, is powerless to purchase," and performed, in all that time, the labor of the household, and did the family sewing and gave them all her wages. Said James McLaughlin, after making a will in her favor, as to one-half of his property, revoked the same, as we have seen, by codicil, to avoid making her independent, and to secure a continuance of the relation with his wife after his death, which occurred in the year 1876. Some years thereafter said Catherine died, suddenly, in a spasm, intestate, and without providing for this plaintiff, or carrying out the said agreement, by which plaintiff was to acquire the property, at their death, and the whole property augmented, as alleged, in the sum of \$5,000 by her own earnings, now goes, if her equitable claim on the property is not enforced, to defendants, who, it is alleged, were residents of St. Louis, visitors at the house of said Catherine, and were aware of the relations between plaintiff and said James and said Catherine McLaughlin, and of plaintiff's expectations, and thus acknowledged and acquiesced therein.

For the reasons indicated, the petition contains, we think, a good cause of action, and we therefore reverse the judgment and remand the cause for further proceedings in conformity hereto, in which SHERWOOD, BLACK, and BRACE, JJ., concur; NORTON, C. J., absent.

Judgment remanded.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

MAYNARD v. VINTON.

(80 Mich. 139.)

Will — attestation — “in presence of testator.”

If the signing of a will by the witnesses was in such a place that the testator might have seen them doing it if he had chosen, and he was not prevented from seeing it by physical inability, it was “in his presence.” (*See note, p. 285.*)

PROBATE proceedings. Probate was granted by the Probate Court, but this was reversed by the Circuit Court. The opinion states the facts.

Birney Hoyt and L. D. Norris, for proponents.

J. C. Fitz Gerald and N. A. Earle, for contestants.

CHAMPLIN, J. The testatrix, Mattie V. Vinton, was the wife of Porter Vinton, the contestant of her will, and at the time of her decease they had been married some fourteen or fifteen years. At the time of their marriage Porter Vinton was a widower of some fifty years of age, with several children, all residing on his farm near Kalamazoo. The testatrix was then about eighteen years of age, and had no property, and never acquired any thereafter, except from the contestant. After the marriage, they resided on the farm some two years, and sold and removed to Alpine, Kent county,

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where they resided on a farm purchased by Mr. Vinton until about the year 1879, when he bought a house and lot in Sparta, in said county, and moved there, where he built a grist mill. In the summer of 1882, he sold the mill, taking back a mortgage in the name of his wife for \$3,491.23, she assigning to him \$1,492.23, leaving just \$2,000 of the entire amount to her. The house and lot in Sparta was also deeded to Mrs. Vinton. These transfers to Mrs. Vinton were made under an agreement between Vinton, his wife, and Walter, one of Vinton's sons, who had worked for and turned his wages into the family fund for some years, whereby Walter was to have a deed of one-half of the Alpine farm, and continue to live with and apply his wages for the benefit of the family. In consideration of the transfers above specified to Mrs. Vinton, she agreed to make her will, wherein she was to give, devise and bequeath said property, at her death to Porter Vinton during his life, and the remainder to Walter; and in pursuance of said agreement, and the transfers to Mrs. Vinton of said property, she, on the 6th day of October, 1882, made and executed a will giving and devising all of her estate, real and personal, to her husband, Porter Vinton, to be used and enjoyed by him during the term of his natural life, and from and after his decease she gave the same to Walter Vinton, his heirs and assigns forever. She appointed Porter Vinton executor of this will. Walter continued to live with the family, and give them the benefit of his earnings, except sufficient to supply himself with clothing. He was earning \$2 a day and upward.

On the 18th day of August, 1883, the testatrix was taken sick with a severe attack of pneumonia, and gradually grew worse, and died on Friday, the twenty-fourth of August, at about seven o'clock in the evening. On the Monday morning after she was taken ill, being the twentieth, she sent for a neighbor, one Edwin Bradford, and desired to know if he was going to the city of Grand Rapids that week; if he was she wanted to send down by him. He told her that he did not know; that he might go down the latter part of the week. She sent for him again the next day, but he did not go to see her that day, and on Wednesday or Thursday she sent word to him again that she wanted to see him. At this interview she told him that she had made a will, and had left it with Mr. Fitz Gerald, and she wanted Mr. Bradford to go down and get that will, and told him she wanted to make a new will, and wanted him to

go to Grand Rapids that morning. He told her if she wanted to make a new will it was not necessary that she should go down and take up that will; that the last will would stand any way, and besides he did not see how he could get away to go. She then requested him to go and get Mr. Rezin Maynard, an attorney residing in the village, to make her will immediately. Mr. Bradford spoke to Mr. Maynard, and they came back to the sick room, and Mrs. Vinton dictated how she wished to dispose of her property. Mr. Maynard then returned to his office and drew the will, and he, together with Mr. Bradford, returned to her room, where the will was read to her by Mr. Maynard, and she said it was all right, and signed there in the presence of Mr. Bradford and Mr. Maynard, and she requested them to sign their names as witnesses. The bed was in the north-west corner of the room, with the head to the north; in the north-east corner was a bureau, upon which the will was laid when the witnesses subscribed their names. During the time Mr. Maynard was subscribing his name as a witness, Mr. Bradford was fanning Mrs. Vinton, and from the testimony it was not entirely certain whether or not Mr. Bradford, in the act of fanning Mrs. Vinton, did not stand between her and Mr. Maynard when he was subscribing his name, so that she could not see him do it, had she looked; otherwise she could have seen him had she been inclined to look.

By the terms of this will she bequeathed to her mother \$100 a year during her natural life, a velvet chair, and a willow rocking-chair; to her sister the house and furniture in the village of Sparta, except the furniture therein otherwise bequeathed; to her niece, her piano, gold watch and chain, clothing and jewelry; to John D. Miles, \$530, being the amount loaned to her by him. She directed \$50 to be expended for a monument for herself. The balance of her estate she devised to her husband, Porter Vinton, for his use during the term of his natural life, and at his death to be divided between her mother and sister equally. She appointed Edwin Bradford and Rezin A. Maynard executors. This will was presented to the Probate Court of Kent county for probate by the executors therein named, when Porter Vinton appeared, and contested the same. The court, after hearing, entered an order admitting the same to probate as the last will and testament of Mattie V. Vinton, deceased, and Porter Vinton appealed to the Circuit Court for the following reasons, viz.:

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First, that the said paper admitted to probate as the last will and testament of the said Mattie V. Vinton, deceased, is not the last will and testament of the said deceased.

Second, that the said Mattie V. Vinton, at the date of signing, sealing and publication thereof, was not of sound and disposing mind and memory, and was incapable of making a valid will.

Third, that the making and execution of said paper was procured by undue influence, and the same is not the last will and testament of said deceased.

Fourth, that the said paper was not made nor executed as required by law.

Fifth, that the said paper was not witnessed nor executed as required by law.

The Circuit judge charged the jury that there were three questions of fact for them to determine:

First, was the instrument executed with the formality required by the statute?

Second, was Mrs. Vinton, at the time of its execution, of sound and disposing mind?

Third, was any undue influence exercised over her, by means of which her free will was overcome, so that the will does not reflect in its provisions her real wishes?

Upon the first question he charged as follows:

“*First*, then, was the will duly executed? There is no dispute that the instrument was signed by Mrs. Vinton. It is claimed by the contestant that the testimony fails to show that it was attested in the presence of the testatrix by Mr. Maynard. The statute requires that all wills shall be attested and subscribed by the subscribing witnesses in the presence of the testator. It is a sufficient compliance with this provision of the statute if the instrument be signed by the subscribing witnesses where the deceased might have seen the act of signing if she chose. It must appear from the evidence however that at the time of the signing by each of the witnesses, she was in a position where she might, and so circumstanced that she could, if she chose, have seen each sign his name. If she could not have seen Mr. Maynard sign his name, either by the position of Mr. Bradford, or because of her physical inability to see him—to turn her head so as to see him—the attestation would not be valid. But if she could have seen him if desired, even if some change in her position was necessary to bring Mr. Maynard

within the range of her vision, if she was able to make such movement, the attestation was regular; for all the law requires is that the testatrix shall be in a position which enabled her to see the signing if desired; and if she was in a position to see, or where she might have seen the signing, and either from indifference to the formality, or from other cause, allowed the signing to take place without observing it, this would not invalidate the act. If you find the will was legally witnessed and attested the next question is," etc.

The testimony upon which this charge was based was given by the two subscribing witnesses to the will, who are the executors therein named, and is as follows: Rezin A. Maynard testified:

"Then I asked her concerning the witnesses of the will — read that clause to her — and she requested Mr. Bradford and myself to sign as witnesses; she signed it in the bed; I held a book for her, I think; the will rested on a book and she signed it; Mr. Bradford held her up — supported her — and she signed the will; then I took the will to a bureau that stood at the head of the bed; there was a door, I think, between the bed and the bureau, and I signed it standing by the bureau, and gave Mr. Bradford the pen, and he signed it standing there; we were in her sight; she could have seen us. * * * After the will was executed I asked her in whose custody she wished to leave it; she said she thought perhaps Mr. Bradford better take it, as he had a large safe where he could keep it, and it would be safe; and I gave it to him and he took it." On cross-examination he further testified: "When the will was executed she was lying in bed; the bed was in the north-west corner of the room; her feet were toward the south; the bureau I spoke about stood in the north-east corner of the room; I think she was not bolstered up in bed, but had one pillow under her head. * * * When she signed, I held a book in front of her as a rest, and Mr. Bradford helped raise her up, and supported her; she drew her limbs up, and Mr. Bradford supported her, and the book rested on her limbs; she was not able to raise up in bed. * * * When I signed, Mr. Bradford stood by her and near me, and between her and me; I cannot say whether he was fanning her there; I think I asked her who she wished to take the will, and I think she said that Mr. Bradford had better take it; something was said about the safe; but whether she said it, or whether I said it, I don't know." On redirect examination he testified: "I suppose the will was signed

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the day of its date, the twenty-third day of August; her bed stood in the north-west corner of the room; the bureau stood diagonally across the north-east corner of the room; the door was between the bureau and the bed; the whole width of the room was about twelve feet. * * * When the will was signed, I did not observe that Mrs. Vinton appeared to be drowsy or in a stupor to any extent; I didn't notice any thing of the kind."

Edwin Bradford testified: "We were present in the room at the time of the execution of the will; nobody else was there at that time; I think her mother went in with us, but she asked her to go out so that we were there alone; this will was read over to her; we were all present when Mr. Maynard signed it and when I signed it; when I signed it I stood at the left of the bed at the bureau; Mr. Maynard stood at the bureau when he signed it; we signed it at Mrs. Vinton's request; she wanted Maynard and I to sign it as witnesses; we were altogether there in the presence of each. * * * I should say she was of sound and disposing mind and memory at that time, as far as I was able to judge." * * * On cross-examination he testified: "I heard Mr. Maynard's description of how Mrs. Vinton lay in bed, the location of the room, bureau, etc., and that is just as I recollect it; I thought she was a very sick woman, and I didn't think she would get well; when we went to have the will executed she was in bed lying upon her back — she lay upon a pillow." Q. "Did you observe whether she lay in a stupor or not?" A. "No, sir." Q. "Or whether she was pretty nearly asleep?" A. "No, sir." Q. "You didn't observe as to that?" A. "No, sir; I put my hand under her pillow, and kind of raised her up; I think she was not able to raise herself up; she breathed very short and seemed awfully distressed for breath; she only answered 'yes' and 'no' — in monosyllables; after she signed I stood by the bed-side in front of her, and fanned her or kept off the flies; after she signed the will Mr. Maynard took it, and stepped up to the bureau just to the left, and says to me, 'you will have to sign this first;' my name appearing first; I signed the will first; I laid down my fan upon the bed, and turned around to the bureau, and signed the will, and stepped right back and picked up the fan again, and Mr. Maynard signed it; I would not swear I saw Mr. Maynard sign his name; I would not wonder if I stood with my back partly to Mr. Maynard; I was keeping the flies off her; the flies were very bothersome, and would

light right on her face." Q. "She couldn't remove them then herself?" A. "No, sir; and I took the fan and brushed them off; she did not seem to have the strength to remove them herself. I think I stood facing a little to the south with my back partly to Mr. Maynard. At that time she seemed to keep her eyes open. In the position she was there, with my fanning her, I rather think she could look through behind me, and see Mr. Maynard. I could not say for certain that she could; I did not observe her doing it. I think she was looking right up at me. To have seen Maynard she would have had to kind of turned her head and look back of me. I did not see her do that; I don't know but that she was able to do it. I would not swear she was able to do it. After the will was signed, and I let Mrs. Vinton down on the bed again or before I went out, she said she was glad it was over; that she could take a little rest now or something like that. * * *"

On redirect examination he further testified:

"After the will was executed, at the request of Mrs. Vinton I took it and put it in my safe. * * * When I witnessed the will and turned around to fan Mrs. Vinton, she was conscious and sensible, and I saw no difference in her condition any time she was there. She lay in a position where she could see if she desired to all Mr. Maynard and myself did. There was nothing between us to hinder. All she had to do was to turn her head over and look up.'

The foregoing is all the testimony there is on the record affecting the formality or legality of the witnesses' subscribing their names in the presence of the testatrix. The facts being undisputed and showing conclusively that the witnesses subscribed their names in the presence of the testatrix, there was nothing to be left to the jury to determine whether it was legally witnessed and attested. The statute enacts that no will made in this State, except nuncupative wills, shall be effectual to pass any estate unless it be in writing and signed by the testator, or by some person in his presence, or by his express direction, and attested and subscribed in the presence of the testator by two or more competent witnesses. What is meant by the requirement that it shall be attested and subscribed in the presence of the testator has been the subject of numerous decisions, some of which have carried the meaning of the word "presence" to a ridiculous absurdity. The object of the statute is to protect the testator against the fraud of parties witnessing the instrument, and prevent the substitution of one writing for another; and so

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astute have some courts been in construing the statute to prevent frauds upon the testator that they have perpetrated the most glaring frauds upon the testator by defeating his will simply because the foot-board of the bed was too high for the testator to see the witnesses sign their names at a table standing at the foot of the bed (*Newton v. Clarke*, 2 Curt. 320); or because although the witnesses were in plain sight of the testator, yet when they signed their backs were toward him. *Graham v. Graham*, 10 Ired. L. 219. And courts have held that where the testator is a blind person, still the witnesses must subscribe in such position and proximity that had the testator been possessed of eye-sight, he could have seen them; thus making the test of sight the limit of personal presence. If this is the correct criterion then the rule instead of being uniform is subject to great fluctuations, according to the degree of eye-sight a person has. What would be in the presence of a far-sighted person, would be in the absence of a near-sighted one; and what would be a valid execution of a will for one would be wholly worthless for another with equal mental capacity; and a person wearing his eye-glasses or spectacles would have a larger presence than when he laid them aside. Under such a rule, the oculist would appear to be the most important witness to establish or destroy the legal attestation and execution of a will. The statute of this State, as well as those of most other States, enacts that deeds, executed within this State, of lands, or of any interests therein, shall be executed in the presence of two witnesses, who shall subscribe their names to the same as such; yet we never have heard of any such judicial nonsense as that such deeds would be void if the witnesses, in subscribing their names, should sit with their backs to the grantor or should not at the time of subscribing be within the range of his gaze. Why should not the word "presence" receive the same construction in the one case as in the other? Why should the conveyance, if by will, be void as not legally attested and subscribed, and if by deed executed by the same person and under the same circumstances of mental capacity, be valid? I confess I do not see why the word "presence" should not be held to convey the idea attached to its ordinary signification in the common use of language. It is not a technical term or scientific word. Why should such a meaning be put upon this word "presence" that implies that every person who is called upon to witness the execution of a will is presumed to be willing and anxious to foist upon the testator a spurious document, and hence

required to write his name under the eye (if he has one) of the testator. Such a construction must have been born of suspicion, and reared and maintained in distrust of the morality and honesty of our fellow-beings, and I think ought to be relegated to that age of eye-servants whence it originated. The common experience of mankind does not demonstrate that all men are dishonest, and watching and seeking an opportunity to perpetrate a fraud, or to take advantage of the weak and helpless. In this case it is not necessary that we should go, and I am not willing to go any further than this court has already gone in defining what shall be a subscribing in the presence of a testator.

In *Aikin v. Weckerly*, 19 Mich. 504, it was said: "The condition and position of the testator, when his will is attested, and in reference to the act of signing by the witnesses, and their locality when signing, must be such that he has knowledge of what is going forward, and is mentally observant of the specific act in progress, and unless he is blind the signing by the witnesses must occur where the testator, as he is circumstanced, may see them sign if he choose to do so. If in this state of things some change in the testator's posture is requisite to bring the action of the witnesses within the scope of his vision, and such movement is not prevented by his physical infirmity, but is caused by an indisposition or indifference on his part to take visual notice of the proceeding, the act of witnessing it is to be considered as done in his presence. If however the testator's ability to see the witnesses subscribe is dependent upon his ability to make the requisite movement, then if his ailment so operate upon him as to prevent this movement, and on this account he does not see the witness subscribe, the will is not witnessed in his presence."

The testimony is conclusive that the testatrix had knowledge of what was going forward, and was mentally observant of the specific act in progress. She had at that instant requested these two persons, who were the only ones in the room, to subscribe their names as witnesses, and immediately it was done she requested the witness Bradford to put the will in his safe for keeping. She was in a position where she could see both of the witnesses subscribe it; and that she possessed sufficient physical ability to do so, had she desired, is abundantly proved. "It was therefore enough, if the testatrix *might* see. It was not necessary that she *should* actually see the signing, because if that were the case, if a man did but turn

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his back, or look off, it would vitiate a will. Here the signing was within view of the testatrix; she might have seen it, and that was enough." 1 Jarm. Wills, 222 (5th Am. ed. 78). This branch of the case should not have been submitted to the jury, for the reason that the evidence showed that the will was subscribed in the presence of the testatrix within the meaning of the statute.

[Other questions omitted.]

The order appealed from must be reversed, and a new trial ordered, with costs.

Order reversed and new trial ordered.

CAMPBELL, O. J., and MORSE, J., concurred; SHERWOOD, J., concurs in the result.

NOTE BY THE REPORTER.—See *Will of Meurer*, 44 Wis. 398; s. c., 28 Am. Rep. 591, and note 595; *Riggs v. Riggs*, 135 Mass. 238; s. c., 46 Am. Rep. 464; *Baldwin v. Baldwin's Executor*, 81 Va. 405; s. c., 59 Am. Rep. 669.

In *Spaulding v. Gibbons*, 5 Redf. 816, it was held that if the testator's signature was affixed when the witnesses were in an adjoining room, the intervening door being open, in such a position that they could have seen him sign, this was "in his presence."

In *Allen's Will*, 25 Minn. 39, it was held, that the testator actually saw the attesting witnesses subscribe their names as such to the will need not be shown, when it appears that it was done in his immediate and conscious presence, so that he could have seen it if he had felt so disposed.

In *Ambre v. Weishaar*, 74 Ill. 110, where a will was drawn and witnesses were sent for at the request of a testator, and after signing by him at his request, the witnesses went from the bedroom where he was, into a dining-room to attest the same, on account of the want of conveniences for doing so in the bedroom, and he knew that the attestation was going on in the dining-room, and approved it, and from the position he occupied in the bed could have seen the witnesses while signing, *held*, that the will was attested in the presence of the testator.

In *Matter of Downie's Will*, 42 Wis. 66, it was held that where the statute requires that a will to be valid, "shall be attested and subscribed in the presence of the testator, by two or more competent witnesses," no subscription to a will by a witness is valid unless made where the testator (if he so desires, and is not blind) can see the witness subscribe; and it is not sufficient that the witness, after signing as such in an adjoining room outside of the testator's range of vision, brings such subscription to the attention of the testator, who assents to and approves the act. The court said:

"The proposition, that there may be a valid subscribing of a will out of the testator's range of vision, is maintained in but very few cases. The leading case in support of the proposition is that of *Sturdivant v. Birchett*, 10 Gratt. 67. The facts and the ruling of the court are correctly stated in the head-note as follows: 'A will is executed by the testator, and certain persons are requested by him to attest it. For convenience they take it into another room,

out of the vision of the testator, and there subscribe the'r names to the paper as witnesses; and they immediately, within one or two minutes, return to the testator with the paper; and one of them, in the presence of the other, with the paper open in his hand, addresses the testator, and says, 'Here is your will, witnessed,' at the same time pointing to the names of the witnesses, which are on the same page and close to the name of the testator. The testator then takes the paper and looks at it as if examining it, and then folds it up, and speaks of it as his will. *Held*, that under these circumstances, the recognition of their attestation by the witnesses to the testator is a substantial subscribing of their names as witnesses in his presence.' Two of the five judges constituting the court dissented from the decision of the other three judges, holding to the English rule.

"There are a few other similar cases in the same court; at least, cases which affirm the same proposition.

"We believe but one other case has been cited, in which it is directly held that there may be a valid subscribing of a will by a witness thereto out of the view of the testator. That is the case of *Vaughan v. Vaughan*, decided in the County Court of Cook county, Ill., by Judge BRADWELL, and reported in 18 Am. Law Reg. (4 N. S.) 735. The opinion contains a very able argument in support of that proposition; but the argument and decision are based on the statute of Illinois, which only requires that the will be attested (not attested and subscribed) 'in the presence of the testator by two or more credible witnesses.' The learned judge notes the distinction between 'attesting' and 'subscribing,' and denies that the decisions under statutes requiring both acts to be in the presence of the testator are applicable to Illinois to a question concerning the subscribing of a will by a witness. This aspect of the Illinois case is noticed by Mr. Justice GRAY, in *Chase v. Kittredge*, 11 Allen, 49 (see p. 61).

"In a note to *Vaughan v. Vaughan*, *supra*, the late Judge REDFIELD sharply criticised the English rule, and urged upon the courts of this country to break away from it and adopt the rule for which the respondent contends in the present case. Judge REDFIELD there expressed the belief that the English House of Lords, whenever the question should come before it for final adjudication, would establish a different rule.

"The question came before that tribunal in *Hindmarsh v. Charlton*, 8 H. L. Cas. 160, and resulted in a reaffirmance of the rule which had theretofore prevailed in that country. In a note inserted in the third edition of his work on the Law of Wills, after the decision of *Hindmarsh v. Charlton* by the House of Lords, the same learned writer said, that since the rule has been affirmed 'by the unanimous voice of the tribunal of last resort in the authoritative exposition of the common law, it might not answer any good purpose to longer question its reasonableness or necessity.' And in the same connection he refers to the case of *Chase v. Kittredge*, *supra*, which upholds the same rule. 1 Redf. Wills (4th ed.), 230.

"Many cases in this country asserting and applying the same rule are referred to in the opinion in the case last cited, and in the brief of the learned counsel for the appellant in the present case. These are quite numerous.

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"Thus we find an overwhelming weight of authority in favor of the English rule; so overwhelming that as able and independent a jurist as was Judge REDFIELD was constrained to yield to it, although he believed the rule unsound."

ATTORNEY-GENERAL V. LORMAN.

(39 Mich. 187.)

Statute — "manufacture" — gathering ice.

The business of cutting and preserving ice for consumption is "manufacturing." *

INFORMATION to test right to exercise franchise of a corporation. The opinion states the point.

Moses Taggart, attorney-general, *C. J. Reilly* and *Otto Kirchner*, for relator.

Russell & Campbell and *John G. Hawley*, for respondents.

CHAMPLIN, J. This is a proceeding by information in the nature of a *quo warranto* to determine the rights of respondents to exercise the franchises of a corporation organized under "An act to authorize the formation of corporations for mining, smelting, or manufacturing iron, copper, mineral, coal, silver, or other ores or minerals, and for other manufacturing purposes," approved February 5, 1853. The respondents pleaded to the information, therein setting forth, (1) articles of association executed by them under and by virtue of the above act, on the fifth day of January, 1874, and duly filed as required by law, and amended articles of association executed on the third day of April, 1882, and duly filed. (2) That the relator has been a stockholder in such corporation for more than eleven years, and was then a stockholder therein; and from January 1, 1874, to April, 1883, the relator received dividends, was president and director of said company, was actively engaged in performing the duties pertaining to his position, and received a salary for his services. (3) That the respondents are the directors of said Belle Isle Ice Company, and as such manage and control its business; that there are other persons besides the relator and these

* See note, 52 Am. Rep. 107.

respondents who are stockholders in said company, and the plea proceeds to give their names, the number of shares held by each, and states that their residence is in Wayne county, where their business is carried on. To the second of these pleas the attorney-general demurred, and he replied to the first and third.

In his replication to the first plea he sets up and states that the several persons in said plea named did not, by the said articles of association, associate according to the act therein named, for the purpose of engaging in and carrying on any kind of mining or manufacturing business, because said persons entered into the said articles of association for the purpose of entering into the business of gathering ice as it was formed naturally on Detroit river and Lake St. Clair, and of storing said ice, and vending the same, as an article of merchandise, to the public generally, and for no other purpose whatsoever. The replication then asserts that its business hitherto has been confined to gathering, storing and vending the ice, and describes the method and appliances used in conducting and carrying on such business. This replication is demurred to by the respondents for two reasons:

(1) That the matters set forth do not show that the respondents were acting as a corporation under the name of the "Belle Isle Ice Company" without then and there being legally incorporated, or without any legal warrant or authority therefor.

(2) That the matters set forth in the replication do not show that the business carried on by the Belle Isle Ice Company was not a manufacturing business, and as such could not lawfully be conducted by a corporation organized under the laws of the State of Michigan, as in said first plea mentioned.

[Omitting minor question.]

The question therefore is, is the purpose set forth in the articles such as the statute authorizes the formation of corporations to carry on? We think it is. Its expressed purpose is to manufacture for market Detroit river and lake ice. It was not necessary for the articles to state the means or methods of manufacture, nor are we to presume that the undertaking would be impossible of accomplishment. If under the guise of a legal corporate existence for the purpose of manufacturing, the Belle Isle Ice Company are carrying on or conducting a business not authorized by its articles of association, or conferred upon it by law, the statute provides that an information in the nature of a *quo warranto* may be filed against such cor-

poration to test its right to exercise such franchise or privilege; but leave of court must be first obtained to file such information. How. Stat., §§ 8646, 8647. The present proceeding is not under these sections of the statute, and hence the question whether this corporation is exercising any franchise or privilege not conferred by law calls for no discussion.

My brethren think that the point stated as the second ground of demurrer is likewise well taken. The replication sets forth the manner in which the Belle Isle Ice Company conducts its business as follows:

"Said company owns and leases various river and lake fronts upon the Detroit river and Lake St. Clair during the winter months. When the ice has formed by a natural process, without the aid of any artificial means whatsoever, and of a thickness sufficient for use, it is cut precisely as it is formed by the natural process of freezing on said lake or river, and stored in ice-houses owned by said company. The manner of cutting said ice is and has been as follows: Any snow which may have fallen upon the ice is scraped and shoveled off by means of scrapers drawn by horses, and by hand shovels used by men. The ice is then marked off into squares of twenty-two inches in width, a hand marker being first used to lay out the lines, after which a marker drawn by horses is used, which cuts lines from two to four inches in depth into the ice. Ice-plows, also drawn by horses, follow into these lines, cutting the ice to a depth of from six to fourteen inches, and the remaining thickness of ice is sawed through by means of long saws operated by hand, or is broken off by breaking bars, and separated from the solid mass of ice. The ice thus cut is floated to the foot of inclined slides or elevators leading to the ice-houses where it is to be stored, and is hoisted up by tackle operated by steam or horse power, and conducted to the ice-houses, where it is packed in layers, and covered with some non-conducting material, such as marsh hay or saw-dust. As the ice is required for use, it is transported to large ice-barges built for the purpose, and capable of holding 100 tons of ice, each taken to proper distributing points in the city of Detroit, where the ice is cut into smaller pieces suitable for consumption, and placed in covered wagons, and delivered to customers. In the course of the business, as conducted by said Belle Isle Ice Company, a large number and variety of tools are necessary for clearing, marking, sawing, chopping and handling the ice, as heretofore fully stated,

before it is in proper shape to be delivered to customers and also ice-houses, ice-barges, wagons, and other implements, and a large force of men."

Worcester defines "manufacture" as follows: "(1) The process of making any thing by art or of reducing materials into form fit for use by hand or by machinery; as 'an establishment for the manufacture of cloth.' (2) Any thing made or manufactured by hand or manual dexterity, or by machinery." The same word, as a verb, he defines. (1) "To form by manufacture, or workmanship, by the hand or by machinery; to make by art and labor."

The process described in the replication certainly does show that the ice is reduced into form fit for use both by hand and by the use of machinery, and the answer of the respondents shows that this is done by the outlay of capital; at least of \$50,000, and the quantity thus manufactured annually is about 30,000 tons. It is very likely that the garnering and preparation of ice fit for consumers of the article falls very near the line. True, its natural condition is not changed. The article itself is a natural product, as described in the replication. It is ice when it is taken from the river, and it is ice when delivered to consumers. The form alone is changed. It is reduced in size, and delivered in quantities to suit the convenience of the patrons of the company. But it is not necessary, to constitute the commodity a manufactured article, that a chemical change should be wrought in the thing manufactured. Iron manufactured from iron ore remains iron. Cotton gathered from the boll and by means of complicated machinery, manufactured, becomes the cotton of commerce. Lumber is manufactured from logs or timber, simply by changing its form. And it has been held that grinding bones to produce the bone dust of commerce was manufacturing, within the meaning of the revenue laws of the United States; *Schriefer v. Wood*, 5 Blatchf. 215. So it was held by the Supreme Court of the United States that timber split into staves, or into long pieces designed for shovel handles, was "manufactured," and not covered by the reciprocity treaty of 1854. *U. S. v. Hathaway*, 4 Wall. 404, 408.

The statute, which was designed to foster and encourage manufactures, should receive a liberal construction, and one in harmony with the public interests; and while it was not enacted to lend aid to trivial or unworthy objects it should not be restricted in its operation to exclude such purposes as tend to promote the

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public convenience or necessities. The use of ice as an article of daily use and consumption in all our larger towns has constituted the article one of prime necessity in the various uses to which it is applied, and whether manufactured chemically, or formed by natural processes and reduced by manual labor or machinery to form fit for use, the business, as the majority of the court hold, is comprehended in the statute authorizing the formation of corporations for manufacturing purposes.

Speaking for myself however I must say that if this were a proceeding under sections 8646 and 8647 to test the right of the Belle Isle Ice Company to carry on the business set forth in the replication, I should not consider that business a manufacturing business within the meaning of the law, for reasons which are set forth in the opinion of Mr. Justice DANFORTH in the case of *People v. Knickerbocker Ice Co.*, 99 N. Y. 181; s. c., 52 Am. Rep. 110, and to my mind are very satisfactory.

It follows from what has been said that the demurrer must be sustained, which result renders the discussion or decision of the other questions raised by the pleadings unnecessary.

Demurrer sustained.

CAMPBELL, C. J., and MORSE, J., concurred; SHERWOOD, J., did not sit.

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(59 Mich. 185.)

Deed — delivery.

A father, about a year before his death, executed and acknowledged a deed to his son, and caused to be drawn up a note for \$100 payable to his daughter, which was folded in the deed and both papers were locked up by the father in his bureau drawer, the key to which he kept in his pocket-book on his person till his death. He directed the daughter to open the drawer, at his death, and on the execution of the note by her brother to deliver to him the deed, which was done. He also joined with his wife in deeds to two sons severally and deposited them with a third party, together with a note for \$1,000 payable to the daughter, with oral instructions to keep the papers until the father's death, when on the brothers signing the note the deeds were to be delivered. At this time the father was sick and gave the custodian of the papers to understand that he did not expect to recover. After his death the sons signed the notes and the deeds were delivered to them. The father had always asserted his intention to retain control of all of his

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property until his death, and that unless the notes were signed the grantees should take nothing under the deeds. *Held*, no delivery.*

EJECTMENT. The opinion states the case.

Crocker & Hutchins, for appellant.

Geo. M. Crocker and A. L. Canfield, for defendant.

CAMPBELL, C. J. Plaintiff, as one of the children and heirs at law of Aden Taft, deceased, brought ejectment for an undivided share of two parcels of land owned by his deceased father, which defendant, another son, claims as grantee. One parcel he claims under a deed made by Aden Taft, but held in his own control until death. The other he claims under a deed from said Aden Taft, alleged to have been deposited in escrow with Charles F. Mallory, who delivered it to defendant after his father's death.

Upon the trial the whole controversy turned upon the validity of these two deeds. The court, as to the alleged escrow, told the jury that delivery to a third person, to be delivered to the grantee after the grantor's death, is a sufficient delivery, and that if Aden Taft left the deed with Mr. Mallory with instructions to deliver it to defendant, and he intended thereby to make the deed effectual, and it was so delivered, it was valid. He further charged that the right to recall the deed would make no difference if it was not exercised, and that the fact that the deed was not to be delivered until defendant executed a note for his share of \$1,000 would not affect it if actually made; and further, that a delay of several months in closing it would make no difference, and would not invalidate the deed.

As to the other deed the court held that a deposit of it, with a note to be executed by defendant after grantor's death to his sister, in a locked bureau drawer, to which he kept the key in his pocket-book in his pocket and which so remained till after his death, informing grantee of it and directing that after his death the deed should be taken on signing the note, all of which was assented to by defendant and done, would pass the title if it was so understood and intended by grantor.

There was no considerable dispute about the facts, which were substantially as follows, leaving out of sight some questions relat

* See *Fain v. Smith* (14 Oreg. 82), 58 Am. Rep. 281.

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ing to what is claimed to have been an unauthorized admission of testimony, to which for the present no reference will be made:

Aden Taft was a farmer advanced in years, and living on the premises in dispute. Plaintiff was an elder son who had not lived at home since his youth, and who had been helped in his education. Defendant and another brother, Emery Taft, had been in the neighborhood, and during his later years had been of service to grantor in various ways. He appears to have desired to provide for them specially, as well as to make some provision for a married daughter. While his wife was living in November, 1876, they joined in deeds conveying the principal parts of the land, being east of a highway which traversed the farm, severally to defendant and Emery. Aden Taft also made a will. These deeds and the will he deposited with Charles F. Mallory, together with a note in blank to be signed by Smith and Emery, providing for the payment in specified proportions by each of them to their sister Mrs. Summers, of \$1,000 in five installments, running with interest to begin after his death. Each of the deeds was upon an expressed consideration of \$3,000. All of these papers he gave to Mr. Mallory, with instructions verbally to keep until his death, and thereafter on the signing of the notes to deliver the deeds. After the death of Mrs. Taft, the grantor went to Mallory and said he wanted the will, which he took away with him and the contents of which do not appear. Mallory asked if he wanted the deeds. He said "no;" but told him not to give them up to any other person. When the deeds were drawn up by Mr. Mallory, grantor was sick and did not expect to get well, as he gave Mallory to understand. He died in May, 1879. In January, 1880, defendant and Emery signed the notes, and Mallory gave them the deeds. They had previously called at Mr. Mallory's in September, 1879, but there were some things on which they all desired to reflect and take counsel.

As to the deeds which were retained, and not delivered to Mallory, they were made in April, 1878, about a year before the grantor's death. Mr. Vaughan, a notary, drew up the deeds under grantor's direction, and took the acknowledgment, his son being a witness with him. He also drew two notes of \$100 each, payable to Mrs. Summers, one for each of the grantees to sign, and a note was folded in each deed. Aden Taft locked them up in his bureau drawer, of which he kept the key in his pocket-book on his person, and told his daughter, Mrs. Summers, that when he died she should open

the drawer, and on the execution of the notes, deliver the deeds to grantees. This was done after his death, the key being found as he had explained.

The testimony all agrees that he asserted his intention to keep the control of all his property till his death, and that he referred to the mischief that had been done by old persons conveying away their property while they lived, and that he said that unless the notes were made the grantees should take nothing.

The questions presented on the merits are dependent on whether the deed left with Mallory, or the deed left in Aden Taft's bureau drawer, and subsequently obtained by defendant, operated to vest in him a legal estate in either or both of the parcels of land in dispute. The argument necessarily embraced a discussion of two different classes of conveyances, one where kept by the grantor in his own possession until death, and one where placed in the hands of a third person to be delivered after death; and beyond this is involved the effect of the condition requiring the notes to be given after death, and before the deeds should be given to the grantees.

The first question is whether the deed retained by Aden Taft can be regarded as operative.

The authorities are all agreed that no deed can be valid without delivery by the grantor. It must be made operative by his act while he is able to act. There are cases where deeds and mortgages found to have been in custody of the grantor at his death have been held valid, but this has been done on proof, or facts amounting to proof, that he has made an effectual delivery, and become a mere custodian of the deed thereafter. In every case that we have discovered the question has been whether the deed had been delivered. No doubt, in some cases presumptions may have been stronger than in others, but the fact has been considered as absolutely essential; and where the grantor has retained control of the title, it has been regarded as conclusive.

One reason for this is found in the doctrine, which both under the statute of frauds, and independent of it, is equally clear that the purport of a deed cannot be changed by parol, and that no condition or reservation contrary to its terms is valid. A deed of conveyance in present terms is inconsistent with the retention of a life-estate, and from the time when the deed is delivered as a conveyance, the whole title goes with it and it becomes irrevocable. Some difficulty was apparently raised about delivery, where the

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grantee was ignorant of the transfer; but it has long been settled that a delivery to any third person, intended to make the conveyance operative is a legal delivery. *Doe v. Knight*, 5 Barn. & C. 671; *Hosley v. Holmes*, 27 Mich. 416, and notes; *Souverbye v. Arden*, 1 Johns. Ch. 240. But a delivery to a third person or even to the grantee may be made for other purposes than to give the deed effect. *Johnson v. Baker*, 4 Barn. & Ald. 440; and the mere fact that it is put into their hands, if not as a completed transfer will not bind the grantor. Thus in *Jackson v. Phipps*, 12 Johns. 418; and in *Austin v. Register*, 41 Mich. 723; the deposit of a deed with a public officer, but not for record, and with no purpose of giving the deed effect, was held no such delivery. In *Prutsmann v. Baker*, 30 Wis. 644; s. c., 11 Am. Rep. 592, a deed in a third person's hands, subject to the grantor's orders, was held not delivered. And cases not unfrequently arise where a deed is handed to a grantee for inspection by himself or his counsel, or for some temporary purpose, where there is no completion of the transfer. *Johnson v. Baker*, *supra*; *Gilbert v. North American Life Ins. Co.*, 23 Wend. 43; s. c., 35 Am. Dec. 543. In *Jackson v. Dunlap*, 1 Johns. Cas. 114; s. c., 1 Am. Dec. 100, a deed duly executed but retained by the grantor until the land should be paid for, and he dying before payment, was held inoperative. In *Stilwell v. Hubbard*, 20 Wend. 44, a deed made by the grantor and retained by him, with the distinct understanding that it would become operative at his death, and found among his papers with a will which was designed to alter, was held void for want of delivery during life. In *Fisher v. Hall*, 41 N. Y. 416, it was held after a careful discussion, that where a deed was retained in the grantor's custody, there must be unequivocal proof of a legal delivery intended to be operative. In *Wellborn v. Weaver*, 17 Ga. 267; s. c., 52 Am. Dec. 42, where a deed was intrusted to grantor's agent, to be delivered after death, it was also held that there could be no continuance of agency after death, and that there was no valid delivery.

Where the grantor has by will or otherwise asserted that an actual delivery has taken place, such deeds have been maintained, as they have been in some cases where there was a previously recognized obligation to make them, and they purport to have been made in execution of it. *Exton v. Scott*, 6 Sim. 31, is an example of that kind. But a retention of control of the title has always been held inconsistent with the validity of a deed held in custody.

Naldred v. Gilham, 1 P. Wms. 577; *Uniacke v. Giles*, 2 Moll. 257; *Cecil v. Butcher*, 2 Jac. & W. 565; *Guilmore v. Whitesides*, Dud. Eq. (S. C.) 14; s. c., 31 Am. Dec. 563. It has been suggested more than once that where the purpose of an arrangement is to retain control of property during life, and provide for a *post-mortem* disposition of it, the act is testamentary, and should not be sustained unless made in that form. However this may be, it seems well settled that any deed which is to be maintained after death must have been made operative by some valid delivery by the grantor during life; and whatever disposition has been shown in some cases to raise presumptions on equitable showings, there is no foundation for any rule that will sustain an undelivered deed; and there is no room for presumption when the facts appear.

In the present case there was nothing which would have justified the submission to the jury of the question of the delivery of the deed of 1878. The note which was to be executed after Aden Taft's death was to be executed as a condition precedent to the transfer of the title. It was not executed earlier in fact, and the deed was never delivered earlier. Had Aden delivered it to defendant, to become operative afterward, on the performance of some condition, it might have presented a very different appearance. But the delivery was meant to be, and was in fact posthumous, and therefore void. If any equities arise which parties suppose to bring them within the rules of specific performance, they cannot, if existing, make any difference with this deed, and cannot be considered on this record. We do not suggest that such a case is or is not pointed out by the facts. All such considerations are irrelevant.

The other deed held by Mallory depends on other considerations. If the deed had been delivered to him irrevocably, on the simple condition that he should transfer it to defendant on the death of Aden Taft, it would come within several of our own decisions, and might therefore be valid upon their authority. *Latham v. Udell*, 38 Mich. 238; *Wallace v. Harris*, 32 Mich. 380. There is much authority elsewhere in favor of the same doctrine. But it has not been decided here, or in most of the cases elsewhere, that this rests on the doctrine of escrow. It was said in *Foster v. Mansfield*, 3 Metc. 412; s. c., 37 Am. Dec. 154, that where a deed is deposited with a third person, and "the future delivery is to depend upon the payment of money or the performance of some other condition,

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it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery; but when thus delivered it will take effect by relation from the first delivery." The same distinction is suggested in other cases, where such a delivery is held valid. *Wheelright v. Wheelright*, 2 Mass. 44; s. c., 3 Am. Dec. 66; *Hatch v. Hatch*, 9 Mass. 307; s. c., 6 Am. Dec. 67; *Fairbanks v. Metcalf*, 8 Mass. 230. In those cases, as justly stated, it made no difference on the facts whether the transaction was called an escrow or not; but the distinction is obvious and may perhaps be of legal importance in some instances, as it may easily happen, that under some circumstances, it would be difficult to treat the incidents as identical. In *Ruggles v. Lawson*, 13 Johns. 284; s. c., 7 Am. Dec. 375, the same distinction was pointed out. And in *Doe v. Bennett*, 8 Car. & P. 124, COLERIDGE, J., left it to the jury to find on the facts whether the deed was delivered as a deed in the first instance, or meant to be an escrow and intimated a doubt whether, if not delivered as a deed in the first place it would avail, where not to become operative until after death. In *Tooley v. Dibble*, 2 Hill, 641, a quitclaim by the grantee, during the life of the grantor, was held to attach to the title after the subsequent delivery; but the doctrine was laid down with some qualifications that are not very clear, and the case is only noticeable as bearing on the doctrine of relation, which is more broadly stated than generally qualified by the cases. The Massachusetts cases reserve the consideration of the effect on such a delivery of a retention of control over the title and of revocation. In *Fairbanks v. Metcalf*, before cited, the deed was left in escrow, upon conditions not performed, and the grantor resumed the deed, and subsequently delivered it himself to the grantee, and it was held there was no relation, and that the second delivery was the only one which could be regarded.

While a deed left in escrow is frequently held to relate back for the purpose of avoiding the difficulty of incapacity of the grantor or his death occurring before the deed is handed over by the depositary, yet except for that formal purpose, there is no universal relation. Intermediate rights are valid against the second delivery. The doctrine is clear that the second delivery is necessary to carry title, and that the performance of the condition must be abso-

lute and accurate, and cannot be dispensed with on any otherwise substantial performance. The case of *Watkins v. Nash*, L. R., 20 Eq. 262, is a very strong case on this point, because the fraud of the depositary induced a third party to believe the condition had been performed, but the grantors were held not estopped by his fraud. In *Beekman v. Frost*, 18 Johns. 544; s. c., 9 Am. Dec. 246, by a singular blunder in the head-note, the doctrine of the court, which was to this effect, is misrepresented, and in the digests the same mistake has been perpetrated. The New York doctrine agrees with that elsewhere. In *Artcher v. Whalen*, 1 Wend. 179, a widow on March 22, 1822, deposited a release of dower in escrow, with a note of the owner of the fee, to be delivered to her, and the release accepted; she gave up possession on or before May 1, 1822. She died April 30th, and was buried May 1st, but had made all her arrangements previously to give up possession. The owner had sold the land to a third person on that understanding, and he obtained possession on May 1st. It was held nevertheless that the widow's representatives were not entitled to the notes. In *Hinman v. Booth*, 21 Wend. 267, a deed was left in escrow, to be delivered if the grantee should give bond to the overseers of the poor to support one J. B. The grantee did support him till he died, but he did not make or tender a bond in reasonable time, or at all. It was held that no title passed to the grantee, and that a conveyance by the grantor to other parties was valid. In *Jackson v. Catlin*, 2 Johns. 248; s. c., 3 Am. Dec. 415; affirmed, 8 Johns. 406, it was held, not only that a condition must be performed within a reasonable time, but in that case, at least, must be performed by the party specified. There a tract of 40,000 acres of land was bid off by one Jones, and three others at a sheriff's sale on execution against George Croghan, and the sheriff left the deed in escrow, to be delivered, on payment of the purchase-money, in July, 1774. When the revolution shortly after broke out, Jones and his associates, although committing no overt act of treason, adhered to the enemy, and were attainted by legislative act in 1779. In 1788 an act of the legislature authorized the surveyor-general to pay the purchase-money, and sell the lands, and the controversy arose between his grantees and Croghan's heirs. It was held that the State of New York took no right, and therefore could confer none to stand in the place of the execution purchasers, and that their failure to pay in time avoided the sheriff's deed, and left the title in Croghan or his heirs.

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These cases, and many more which might be cited, hold that until the delivery by the depositary in escrow, in conformity with the conditions of holding, no title whatever passes to the grantee; and as already suggested, the only cases where the nominal title relates back are where, by reason of death or incapacity, such relation is necessary to sustain the deed. *Bishop of Bath's case*, 3 Coke, 326, 36a; *Bucknal's case*, 5 Coke, 35. But no such relation is any more effectual than is necessary for that purpose, and it does not cut off intervening rights of third persons. The grantor's title may be levied on, and sold on execution, or otherwise dealt with so as to cut off the escrow. *Jackson v. Rowland*, 6 Wend. 666; see also *Demesney v. Gravelin*, 56 Ill. 93, and cases before cited; *Murray v. Earl of Stair*, 2 Barn. & C. 82.

It is said that where there is a vested right, under contract, for a valuable consideration, the validity of *post-mortem* arrangements stands on a different footing from voluntary and revocable arrangements. *Stanton v. Miller*, 65 Barb. 58; *Exton v. Scott*, 6 Sim. 31; *Cook v. Brown*, 34 N. H. 460, and cases before cited; *James v. Vanderheyden*, 1 Paige, 385. And in *Thomas v. Sowards*, 25 Wis. 631, it was held that the deposit of a deed, upon conditions which were not set forth in terms, but referring to agreements not mentioned in the deed, did not operate, as a part performance to take the case out of the statute of frauds, and became nugatory.

If Mallory held the deed in question as Aden Taft's agent, to deliver it as his deed when the note should be executed, it could hardly be claimed that any such agency could exist. It remains to be seen whether there is any rule of law which will continue the authority of the depositary to act, when no claim or contract existed which the law could recognize as valid, when Aden died. In law this was purely a voluntary transaction and when Mallory took the deed and unsigned note into his custody defendant had no rights whatever resting in contract. The whole law as to the relation back of an escrow in case of subsequently occurring death or disability is traced back to Shepard's Touchstone, and one or two ancient authorities which treat of it theoretically and without explanation. But so far as the authorities go, ancient or modern, they all assume that the relation back is founded on the unintended or unexpected occurrence of some disability without which the second delivery would have been the act, at its date, of the grantor prevented without his original design. The reported cases where

such a retroactive effect has been given are very rare. The case of *Graham v. Graham*, 1 Ves. Jr. 275, was the only one cited on the hearing where the grantee performed conditions after the death of the grantor. In that case there were a series of connected transactions which would have sustained the decree on other grounds besides those of escrow; but in that case as in every one which seems to have been considered the conditions to be performed by the grantee were contemplated as capable of performance, if not as calling for performance during the life of the grantor, so that if performed as contemplated the transfer of the deed by the depositary would have been the grantor's delivery as of that date. If any other doctrine exists it is very singular that there is no trace of it in the English authorities from which the law is derived and on which it must be based to take it out of the statutes of frauds and of wills. It would make the statute of wills of very small efficacy if parties can provide by verbal arrangements for the passage of their estates after death without the action of trustees, heirs or representatives, in consideration of acts to be performed by their grantees when they will not be alive to understand or approve them.

In such a case as this the performance of the conditions by defendant being a condition precedent, he could have taken no interest in the estate until January, 1880, and up to that time there was no trustee to hold a title, and it must have been in the heirs-at-law. Nothing could have been done during Aden Taft's life to entitle defendant to the land, and the failure to obtain a delivery during life was therefore not the result of casualty or unforeseen events, but was the very essence of the condition itself. The absence of any hint of the validity of such a deposit in escrow among the numerous cases to be found where escrows have been treated of is very convincing proof, that in the absence of any contract relations requiring a conveyance, no such arrangement can be valid. It is as distinctly a testamentary provision as if it had been embodied in a will. But inasmuch as it rests chiefly in parol it lacks the statutory requisites of a devise which required no probate at common law, although it does in this State.

There is no reason of public policy which would justify the enlargement of the range of cases where a title can rest for any of its essentials upon parol evidence. Some of the earlier authorities evidently contemplate that all escrows should be evidenced by writing. Such however does not appear to be the modern rule.

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It is easy to see how difficult it must be to be sure of the facts when the immediate parties have become incapable of explaining them. But to allow the performance of unwritten conditions to be purposely postponed till after death would be to practically remove the restraints against parol and nuncupative wills, and to leave heirs and representatives unprotected against the divestiture of their estates by testimony which they have no means of contradicting.

Finding no support for such consequences in the authorities, and seeing none in legal principles, we think the conveyance must be held invalid.

The judgment must be reversed, and the case remanded for a new trial.

Judgment reversed and case remanded.

The other justices concurred.

HAGGERTY V. FLINT AND PERE MARQUETTE RAILROAD COMPANY.

(30 Mich. 306.)

Carrier — railroad conductor taking fare beyond authority — ejection of passenger.

The plaintiff took passage on defendant's railroad, asked the conductor the fare to his destination, which as the plaintiff knew was a short distance off the defendant's line, was informed of the amount, and paid it to the conductor, receiving a check. At W., the end of the defendant's road, he changed cars, giving up his check, and that car was switched off on another road. The conductor had really charged and taken fare only to W., and had no authority to take fare beyond. The new conductor on the second road demanded the additional fare, which the plaintiff refused to pay, and he was ordered off, and left the train without force or indignity on the part of the trainmen. *Held*, that he could not recover. (See note, p. 307.)

ACTION for ejection from railway train. The opinion states the case. The plaintiff had judgment below.

Wisner & Draper and William L. Webber, for appellant.

Dickinson, Thurber & Husmer, for plaintiff.

MORSE, J. Plaintiff sued the defendant and the Michigan Central Railroad Company jointly in trespass on the case for inju-

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ries resulting, as he claimed, from an ejection from the car of the latter company near Dearborn station. On the trial the Circuit judge directed the jury to find a verdict for the Michigan Central, but submitted the case as against the defendant to their consideration.

Verdict and judgment resulted for plaintiff in the sum of \$1,500, from which judgment defendant appeals to this court upon writ of error.

The showing for plaintiff was substantially as follows:

The defendant runs and operates a railroad from Bay City to Toledo, and its track crosses the Michigan Central at Wayne Junction. Here a car with the passengers for Detroit and points between this junction and that city is switched off and attached to the Michigan Central train, which train and the car so attached is managed and run into Detroit solely and exclusively by the employees of the Central.

The defendant corporation sells through tickets from Bay City and other points along its road to Detroit, which are good, by arrangement, on the Central, and advertises at Bay City through trains to Detroit.

The plaintiff, Dennis Haggerty, a boiler-maker about forty-seven years of age, residing in Detroit about a mile from what is known as the Grand Trunk Junction, in June, 1885, went to Bay City to look for work, going there by another route.

Saturday June 16, 1885, he started for home about 11:15 A. M., taking one of defendant's trains at Eleventh street, in Bay City. He entered a smoking car and took a seat. After the train had started the conductor came along and asked for his ticket or his fare. Plaintiff had no ticket and told the conductor that he lived in Detroit, not far from the Grand Trunk Junction, and wanted to get off there, and asked him the fare. The conductor said it would be \$3.10, which he paid and received a red ticket or check, which he put in his hat. Plaintiff knew the regular fare to Detroit was \$3.25, and that this junction was about three miles out from the Detroit depot.

When near Wayne a brakeman came into the car and sang out, "passengers for Detroit will take second back car." Plaintiff took his satchel and went back into the car designated. Soon after the conductor came in and took the check out of his hat. Plaintiff supposed he was taking up all the Detroit checks. The conductor

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said nothing to him at any time that the fare asked only paid to Wayne, though it appeared on the trial that \$3.10 was the exact fare from Bay City to Wayne Junction. Plaintiff supposed he had paid his fare to Grand Trunk Junction.

After leaving Wayne a new conductor came around taking up tickets and asked plaintiff for his fare. Plaintiff told him that he had paid to Grand Trunk Junction, and in what manner. The conductor said he must pay fifty-five cents, the local fare, or be put off, as he could not ride without a ticket or the payment of fare. Plaintiff only had twenty-five or thirty cents. Plaintiff knew the regular line of the Flint & Pere Marquette road went to Toledo, and not to Detroit, and knew that its cars running into Detroit did so on the Central track; knew that the train he embarked on went on that day to Toledo, and that the car he was in had been detached therefrom, switched upon the other road, and then attached to a Central train.

Before reaching Dearborn the train slowed up and the conductor ordered the plaintiff to get off the car, which he did. No violence or indignity was offered him by the conductor or any of the trainmen, nor was he touched by them, but he felt some shame and mortification because of the ejection in the presence of the passengers. The plaintiff was not injured in any way by the act of getting or jumping off the car.

It was raining at the time, and plaintiff walked a few rods to a grocery, taking shelter under the awning. He was wet before he got there as he claimed. He waited until it cleared up a little and then walked along the railroad track home, passing Dearborn station without stopping. Two trains passed him while he was going. It rained more or less that afternoon. He arrived home at six P. M. very wet. In the morning he felt stiff. Was around the house unwell two or three days; then sent for a doctor who attended him from June 20 to June 25. Was unable to work for about three weeks. Doctor's bill for attendance and medicine amounted to eight or nine dollars. Wages were worth about that time \$2.75 per day. His illness was acute rheumatism in leg or thigh. Has not been able to work as well since as before his sickness.

It also appears without contradiction by the testimony of David Edwards, assistant manager of defendant's road, a witness sworn on plaintiff's behalf, that the tickets sold by the Flint & Pere Mar-

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quette railroad, which by arrangement are good for transportation over the Michigan Central to Detroit, are coupon tickets consisting of two parts. The first part is taken up by defendant's conductors, and the balance left for the Central conductors to take up. He also says, which is not disputed:

"Our conductors are only authorized to collect as far as our road goes, to Wayne Junction, on a Detroit passenger. They are not authorized to accept cash fare to any point off the line of the Flint & Pere Marquette railroad. When a passenger having entered the train of the Flint & Pere Marquette Railroad Company under those circumstances reaches Wayne and passes upon the Michigan Central line, the Michigan Central collects the regular local fare, fifty-five cents, I believe, from Wayne to Detroit. It is the same from Wayne to the Grand Trunk Junction, I think. Under this arrangement between the Michigan Central and the Flint & Pere Marquette companies, the Flint & Pere Marquette company has no control whatever over the Michigan Central after their cars or passengers pass to the line of the Michigan Central company. The Michigan Central engines and trainmen operate and run the trains from Wayne to Detroit, and the Flint & Pere Marquette have nothing to do with it. In case a through car passes over the road, it is taken by the engines of the Michigan Central at Wayne and hauled to Detroit."

The train that plaintiff took was advertised as a through train to Detroit. The company has a little ticket office at Eleventh street in Bay City, where plaintiff got on, but does not require persons to buy tickets before entering the cars there. If a passenger pays his fare on the train, the conductor has no power to take pay further than Wayne, and when the passenger leaves defendant's road there, and his car is attached to the Michigan Central train, he is on the same footing as any other passenger on that road going from Wayne to Detroit or any intervening point.

It is a frequent occurrence for passengers to get on at Eleventh street without tickets, and there has never been any objection to taking fare on the cars or any remonstrance made to passengers for getting on there without tickets. It was conceded by the plaintiff's counsel upon the trial that as far as the Michigan Central was concerned the ejection of the plaintiff was lawful, and that the plaintiff could only recover from that company damages for putting him off at an improper place or time.

[Omitting a question of damages.]

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But a more serious question arises as to his right to recover at all. The defendant's counsel asked the court to instruct the jury that the plaintiff had no right of action under either count of the declaration, there being two counts; and also that, it being undisputed that the cash fare from Bay City to Wayne Junction was \$3.10, the plaintiff, having only paid that amount, was not entitled to further transportation, and could not recover.

The theory of plaintiff's declaration is, so far as it charges liability upon the Flint & Pere Marquette Railroad Company, that the plaintiff paid to said company the full price and value required and demanded by it for his passage from Bay City to Grand Trunk Junction; that the company received and accepted it, and by so doing entered into an agreement, and it became its duty to protect him from ejection from the cars of the Michigan Central, and to guaranty him safe conveyance to his destination.

The Circuit judge instructed the jury upon the same theory as follows: "The plaintiff, in his statement, makes out, as I regard it, a *prima facie* case. As I understand the plaintiff's statement, he bought a right from Bay City to the Grand Trunk Junction of a conductor of the Flint & Pere Marquette road, for which he paid, he claims, the amount the conductor charged him, \$3.10, and in evidence of which he received a check which the conductor gave him. Now on that check there was no writing, no printing; it was a colored check, which was put into his hat, as he says, and he received it as the evidence of his right to ride. If his statement is correct, the conductor did not tell him he would need a ticket; didn't tell him he would need any different arrangement; didn't tell him that would take him only to Wayne Junction; but actually accepted his fare to the Grand Trunk Junction, \$3.10, and by that means gave him a right, so far as the Flint & Pere Marquette company is concerned, to ride to Grand Trunk Junction. Whether that was the full fare to Grand Trunk Junction is something you have nothing to do with. The conductor represented the company, and representing the company, the plaintiff had a right to rely upon the information, and he had a right to believe he had paid for a ride to the Grand Trunk Junction."

And under the evidence to support the theory of the plaintiff's declaration, it must be claimed, as the Circuit judge charged, and as plaintiff's counsel here contend, that the conductor, as the agent of the company, contracted in behalf of the defendant to carry the

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plaintiff to Grand Trunk Junction, and that the conductor had power and authority to make such contract. The argument is made that the conductor, taking the fare as he did, giving the plaintiff no information that the fare so paid would not take him to his destination, and permitting him to enter upon the last stage of his journey, changing into the car to be switched off, without giving him even a hint that he could ride no further without paying local fare on the other road, bound the company, by these acts, to provide the plaintiff passage on the Michigan Central to the Junction, and established its liability for all damages occurring to the plaintiff by reason of his expulsion from the car by the employees of the Central.

As heretofore shown by the undisputed evidence, the conductor had no authority from the defendant to make any contract for passage on the line of the Michigan Central road, or to collect any fare in such cases as the plaintiff's beyond Wayne Junction. He only took the fare to that point. He did not tell plaintiff he could ride any further, but when the plaintiff said he wanted to pay to Grand Trunk Junction, told him the fare was \$3.10, and received it without saying any thing. The plaintiff understood he had paid the whole distance, and the conductor did not undecieve him. But even if the conductor had told him in so many words that he could ride for the amount paid, to the point of destination stated by plaintiff, it would not have altered the case if the conductor had no authority to make such an agreement. No evidence was introduced showing any action by the defendant by which the plaintiff was induced to believe that the conductor had any authority to collect fare or grant rides beyond Wayne Junction.

The case then must rest upon the general principle that an agent, to bind his principal, must act within the scope of his agency. In the absence of any testimony showing that the defendant allowed its conductors to collect fare from Bay City and other points to Detroit, or to places between Detroit and Wayne, there was no reason for holding that the conductor in this case could bind the company as claimed by plaintiff's counsel. To hold this would be equivalent to holding that the conductor might have collected the fare to New York, and thereby bound the defendant to furnish passage over its connecting lines to that point. There being no express authority conferred upon this conductor to make any such contract, nor any usage or facts connected with his position from

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which such authority can be implied, the plaintiff cannot base a claim for damages upon his conduct or acts in this case.

It is a matter within the common observation and knowledge of the travelling public, that when passage is sold by one railroad company over connecting roads to any point, tickets are issued with coupons, consisting generally of as many parts as there are different lines of road to be travelled over, and that conductors only take fare, with or without tickets, upon the line of their own roads. There is nothing to show that plaintiff was not aware of this general rule, nor that there was any thing in the manner of defendant's conducting its road to give him reason to believe that its practice was otherwise. The plaintiff could not enlarge the scope of the conductor's agency, or increase defendant's liability, because of the belief in his mind that he had paid the conductor to Grand Trunk Junction, when in reality he had only paid to Wayne.

The record clearly shows that the plaintiff, under his own statement, had no cause of action against the defendant, and the court should have so informed and instructed the jury.

The judgment is reversed and a new trial ordered, with costs.

The other justices concurred.

Judgment reversed.

NOTE BY THE REPORTER.— Where a passenger had paid for and obtained, as he supposed, a ticket entitling him to passage to his destination, but which by mistake of the ticket agent only entitled to passage to a nearer point, and before reaching his destination he was ejected, it was said that he might recover in an action for breach of contract. *Frederick v. Marquette, etc., R. Co.*, 37 Mich. 342. To same effect, *C. B. & O. R. Co. v. Griffin*, 68 Ill. 499.

BRONSON V. BRUCE.

(39 Mich. 467.)

Libel — newspaper — candidate for office.

A publication in a newspaper, falsely imputing a crime to a candidate for public office, is actionable. The defendant's honest belief of its truth may mitigate damages.*

LIBEL. The opinion states the case. The defendant had judgment below.

*See *Jones v. Townsend's Adm.* (21 Fla. 431), 58 Am. Rep. 676.

Glidden & Marsh and *Frank Dumon*, for appellant.

Stone & Hyde, for defendant.

CHAMPLIN, J. At the general election in the year 1882 the plaintiff was a candidate for Congress.

The defendant was then editor and publisher of the *Big Rapids Current*, a newspaper published in the city of Big Rapids, in the county of Mecosta, and circulated in that and other counties in the congressional district which was sought to be represented in Congress by the plaintiff, as well as in other counties of the State outside of said district.

The defendant, through the columns of his newspaper, opposed the election of the plaintiff to the office for which he was a candidate, and supported the election of the opposing candidate. After the plaintiff was placed in nomination for the office, and before the election to be held for representative in Congress, the defendant published in his paper and circulated throughout the district, and sent the same to exchanges in other parts of the State, certain articles concerning the plaintiff which the plaintiff claims to be libellous, and this action is brought to recover damages therefor.

The defendant pleaded the general issue, and gave notice:

(1) That he would prove that he was justified in so doing, for the reason that the alleged defamatory matter, and the several statements in the articles so published by defendant, were each true in substance and in fact as published; and

(2) That the same was a privileged communication, and statements therein were *bona fide* comments upon the acts and statements of said plaintiff of the several matters referred to therein, and of the acts, statements and conduct of the plaintiff in reference thereto, and of and concerning the plaintiff as a public man, and made for the public good, and were published as such comments without any malicious intent or motive whatever.

At the trial the publication was not disputed, neither can it be disputed that the article is libellous if not true. It charged him with the crime of forgery; of the theft of deposits of poor men and women; and of cheating laboring men of their hard earnings.

Two questions are raised upon the charge of the court:

(1) Upon the correctness of his instructions relative to the privileged character of the publication; and

(2) Upon his instructions relative to the mitigation of damages.

The learned judge, after stating that privileged communications are of two kinds, and defining and illustrating what is absolute privilege, instructed the jury relative to qualified privilege as follows:

“There is another kind of privilege which is not absolute, but which is conditioned on a theory that there is no malice on the part of the person uttering the communication or publishing the libel. It is competent — it is justifiable — for the press to comment upon the character and standing — intellectually, morally, physically and otherwise — of a man who offers himself as a candidate for office of trust. I say it is competent to do that, depending of course upon the circumstances of the case and the surroundings.

When a man sees fit to take the stand before his constituency for a public position and public honors, he thereby, to a certain extent, makes himself public property, subjects himself to criticism by his constituency. And if it is made to appear that the criticism is just, is proper, is made in good faith, is made without malice and for the public good, for the purpose, as supposed by the person at the time, to prevent an incompetent and unfit and unsuitable person from receiving the majority of the votes of the electors of the district, or as the case may be, that article is *prima facie* privileged, and the law will require of the party who complains of the article to show that the same was published with bad motives, and not for good ends and purposes. * * * When that is shown that privilege vanishes, and it is no longer a protection to the person apparently covered by it in the first instance.

In this case, gentlemen, it appears beyond dispute, that at the time of the publication of these articles, Mr. Bronson was a candidate on a fusion ticket for Congress from this congressional district, and was then before the people for that purpose. These articles were published of and concerning him, reflecting upon his character and standing as a man, and his connection with the Exchange Bank, etc. And it is claimed by Mr. Bruce that he published these with good motives and for justifiable ends, and with no malice whatever. That is his claim. If that is true; if he had no malice, no disposition to specially injure this man, Mr. Bronson, but published the same in good faith, honestly believing that the occasion required it, then the communication is privileged, and the plaintiff cannot recover in this suit, even though the communications them-

selves were false; because if they were privileged by the occasion, that is a complete justification to the action. Right here is the starting point in the case: Were the articles privileged? They are *prima facie* privileged by the occasion, in my judgment, and I so charge you as matter of law. But it will be for you to determine whether this man Bruce, in the publication of the article, was actuated by private malice or malice of any sort, at that time. If so, then that privilege ceased."

The Constitution of this State provides that "no law shall ever be passed to restrain or abridge the liberty of speech or of the press; but every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of such right." Article 4, § 42.

The publisher of a newspaper possesses no immunity from liability in publishing a libel, other or different from any other person. The law makes no distinction between the newspaper publisher and any private person who may publish an article in a newspaper or other printed form; and if either abuses the right to publish his sentiments on any subject and upon any occasion, he must defend himself upon the same legal ground.

As was said by the Supreme Court of West Virginia in *Sweeney v. Baker*, 18 W. Va. 183; s. c., 31 Am. Rep. 757:

"The fact that one is a candidate for office in the gift of the people affords, in many instances, a legal excuse for publishing language concerning him as such candidate for which publication there would be no legal excuse if he did not occupy the position of such candidate, whether the publication is made by the proprietors of a newspaper, or by a voter or other person having an interest in the election. The conduct and actions of such candidate may be freely commented upon, his acts may be canvassed, and his conduct boldly censured. Nor is it material that such criticism of conduct should, in the estimate of the jury, be just. The right to criticise the action or conduct of a candidate is a right, on the part of the party making the publication, to judge himself of the justness of the criticism. If he was liable for damages in an action for libel for a publication criticising the conduct or action of such a candidate, if a jury should hold his criticism unjust, his right of criticism would be a delusion, a mere trap. The only limitation to the right of criticism of the acts or conduct of a candidate for an office in the gift of the people is that the criticism be *bona fide*. As this right

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of criticism is confined to the acts or conduct of such candidate, whenever the facts which constitute the act or conduct criticised are not admitted, they must of course be proven. * * * His talents and qualification, mentally and physically, for the office he asks at the hands of the people may be freely commented on in publications in a newspaper, and though such comments be harsh and unjust, no malice will be implied; for these are matters of opinion of which the voters are the only judges; but no one has a right by publication to impute to such candidate, falsely, crimes, or publish allegations affecting his character falsely."

The authorities are numerous, and fully sustain the position, that a publication in a newspaper concerning either a public officer, or a candidate for an elective office, which falsely imputes to him a crime, is not privileged by the occasion, either absolutely or qualifiedly, but such publication is actionable *per se*; the law imputing malice to the publisher or author. *Com. v. Clapp*, 4 Mass. 165; *Curtis v. Mussey*, 6 Gray 261; *Aldridge v. Press Printing Co.*, 9 Minn. 133 (Gil. 123); *Seely v. Blair*, Wright (Ohio), 358, 683; *Root v. King*, 7 Cow. 613; *King v. Root*, 4 Wend. 113; *Rearick v. Wilcox*, 81 Ill. 77, 81; *Com. v. Odell*, 3 Pittsb. 449, 459; *Brewer v. Weekley*, 2 Overt. 99; s. c., 5 Am. Dec. 656.

It was said by Mr. Justice CAMPBELL, in the case of *Detroit Daily Post v. McArthur*, 16 Mich. 451, that "The law favors the freedom of the press so long as it does not interfere with private reputation or other rights entitled to protection. And inasmuch as the newspaper press is one of the necessities of civilization the conditions under which it is required to be conducted should not be unreasonable or vexatious." And again: "Where the wrong done consists in a libel, which can never be accidental, the publishing is therefore always imputed to a wrong motive, and that motive is called malicious."

In *Whittemore v. Weiss*, 33 Mich. 353, Chief Justice COOLEY said: "The judge charged the jury that malice is to be presumed from the publication and its falsity; that to rebut this presumption defendants must prove that they made the publication in good faith, believing it to be true in all its essential parts and for a proper purpose. Defendants insist that the purpose is immaterial if they believe what they published and made the publication in good faith. This might be so if the publication had been true, but good faith cannot protect a false publication, nor can one excuse himself for making a mistaken assault upon his neighbor's

reputation by showing the absence of malice when, even had his charge been true, there was no purpose in bringing the matter to public notice. If one makes an attack which the occasion does not justify there is no injustice in requiring him to show the truth."

In *Bailey v. Kalamazoo Publishing Co.*, 54 Mich. 251, 257, Chief Justice CAMPBELL said: "The public are interested in knowing the character of candidates for Congress, and while no man can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made, in an honest attempt to enlighten the public, it must reduce the damages to the minimum if the fault itself is not serious, and there should be no unreasonable responsibility when there is no actual malice."

In *People v. Detroit Post & Tribune Co.*, 54 Mich. 457, 462, Mr. Justice SHERWOOD said: "There can be no question at this late day but that the public newspaper has the right (whether it shall be regarded as its duty or not) to discuss those matters which relate to the life, habits, comfort, happiness and welfare of the people. In doing so it may state facts, draw its own inferences and give its own views upon the facts. It may err in its deductions, and if they are false they are not actionable unless special damages are shown; but false assertions, when they impute the commission of a crime, are actionable, and when not based upon any facts, legally tending to prove the facts imputed, the publication cannot be said to be privileged."

These excerpts from the decisions of this court show that they are in harmony with the authorities cited from other courts. The electors of a congressional district are interested in knowing the truth, not falsehoods, concerning the qualifications and character of one who offers to represent them in Congress, and it is the right and privilege of any elector, or person also having an interest to be represented, to freely criticise the act and conduct of such candidate, and show, if he can, why such person is unfit to be intrusted with the office, or why the suffrages of the electors should not be cast for him. But defamation is not a necessary and indispensable concomitant of an election contest. "Slander," says Judge OVERTON, "is no more justifiable when spoken of a man with a view to his election than on any other occasion. Unhappy indeed would be any people when in the exercise of one right you destroy as important a one. Let his talents, his virtues and such vices as are likely to affect his public character be freely discussed, but no

falsehoods be propagated." To hold that false charges of a defamatory character made against a candidate are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems to me is a most pernicious doctrine. It would deter all sensitive and honorable men from accepting the candidacy to office and leave the field to the profligate, the unprincipled and unworthy; to men who have no character to lose, no reputation to blemish. It could scarcely be expected that any man worthy of the position would consent to stand for an office and have his reputation tarnished, his good name scandalized in the face of the whole community, if such doctrine as this is to prevail. Besides under the guise of assisting the people to select a fit man, the voters are deceived by falsehood and induced to withhold their support from the maligned candidate, and so two wrongs are perpetrated: one upon the candidate, the other in misleading the voter. Under such a rule the advocates of both or all candidates would let fly their poisoned shafts of defamation and charges to be met with counter-charges, until the bewildered voters, not knowing who or what to believe, must of necessity shut their eyes to the fitness and character of the candidate, and join the ranks of the party whose banner bears the inscription, "Principles, not Men."

In a representative form of government, the public morals and the administration of public affairs cannot rise to a higher plane than the character of those who are elected as representatives, or to fill the offices. If public virtue is to prevail and distinguish the execution of high public trusts, candidates for those positions must be men of virtue, as well as men of character and capability; and the stability of our institutions in a great measure depends upon the confidence and esteem in which those occupying such high positions are held by their fellow-citizens. This cannot be attained if charges of crime against them, which are falsely made or circulated in the community, are absolutely privileged, though made in good faith. I think the Circuit judge erred in laying down such rule. If the charges were false and made in an honest belief of their truth after reasonable and proper investigation, such fact would go to mitigate the damages, and under certain circumstances, such as are alluded to in *Bailey v. Kalamazoo Publishing Co.*, the jury would be warranted in reducing the damages to a minimum.

In the case under consideration the parties were both residents

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of the city of Big Rapids, and they had resided there over ten years. It would seem an easy matter for the defendant to have informed himself of the truth of the statement of facts made in the article published. He testifies that he had no personal ill-will against the plaintiff and knew him very well. It seems reasonable, not as asking too much, for him in the course of his investigation, to have called upon the plaintiff and requested a statement as to the truth of the charges he had heard and was about to repeat. The reasonableness of his investigation however was for the jury, under all the circumstances, from which they were to deduce the fact whether the publication was made in good faith, and with an honest purpose to enlighten the public upon the character and fitness of the plaintiff for the position he sought. The article claims to state facts, and those facts charged the plaintiff with a crime, and I think the defendant cannot excuse himself from liability, without proving the truth of such charges.

The fact that the article was copied from a paper published in an adjoining county, and accredited to that paper, was received in mitigation of damages. This is the law in case of verbal slander, but the rule does not necessarily always obtain in cases of libel. It must depend upon the circumstances of the particular case.

The judgment must be reversed and a new trial granted.

The other justices concurred.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
NEW HAMPSHIRE.

HOVEY v. MORRILL.

(61 N. H. 2.)

Set-off — cross-judgments.

A judgment may be set off against a cross-judgment to prevent injustice, although the latter has been assigned to a third person.

BILL for set-off. The opinion states the point. The complainant had judgment below.

Morrison & Bartlett, for defendant.

Sulloway, Topliff & O'Connor, for plaintiff.

ALLEN, J. Courts of law and of equity have the power to set off mutual judgments, one against the other, so far as either will apply. The power is an equitable one, to be exercised in the interests of justice, and it is not derived from the statutes governing the right of set-off of one claim against another in suit, or of executions in which the plaintiff in one is the defendant in the other. Under the statutes, to enable one party to set off a claim against another in suit, the claims must be mutual to and from the same persons in the same right and capacity, and liquidated or determinate by computation. Independent of any statute, mutual judgments, although not founded on mutual debts, will, on equitable principles and to prevent injustice, be set off against each other.

Hovey v. Morrill.

Brown v. Warren, 43 N. H. 430. When the party claiming the benefit of a set-off could not avail himself of the right in the trial of the action, if justice requires it, the cause may be continued or execution stayed until the claimant obtains judgment, which may then be set off against the other. *Hutchins v. Riddle*, 12 N. H. 464; *McQuesten v. Bowman*, 17 N. H. 24; *Smith v. Woodman*, 28 N. H. 530. In exercising the power of setting off mutual judgments, the real and not the nominal parties are considered; and if one judgment has been, in good faith and for a valuable consideration, assigned to a third person before application for a set-off is made, such third person is the real party in interest, and no set off can ordinarily be allowed. *Perkins v. Thompson*, 3 N. H. 144; *Wright v. Cobleigh*, 23 N. H. 32; *Goodwin v. Richardson*, 44 N. H. 125; *Makepeace v. Coates*, 8 Mass. 451; *Ames v. Bates*, 119 Mass. 397; *Zogbaum v. Parker*, 55 N. Y. 120; *Ramsey's Appeal*, 2 Watts, 228; s. c., 27 Am. Dec. 301; *Williams v. Evans*, 2 McCord, 203.

Cases often occur in which the set-off of one judgment against another is allowed, regardless of a prior assignment of one to a third person. Such cases are, where the assignee has taken the judgment charged with notice of the right of set-off as an existing defense. *Rowe v. Langley*, 49 N. H. 395. Where, through insolvency of the assignor at the time of the assignment, the party claiming the right of set-off had no other means of collecting his debt. *Gay v. Gay*, 10 Paige, 369, 375, 376. And where, in anticipation of an application to make the set-off, the assignment was made for the purpose of defeating the right. *Duncan v. Bloomstock*, 2 McCord, 318; s. c., 13 Am. Dec. 728. These cases may be regarded as exceptions to the rule, and so decided on the sufficient ground that injustice would be done in any other way; or they may be regarded as not within the rule, and that the assignments under the circumstances of those cases could not have been made in good faith. In all cases where the assignment is without consideration, not in good faith, or fraudulently made to defeat the application, the court will direct the set-off to be made. *Cross v. Brown*, 51 N. H. 486; *Hurst v. Sheets*, 14 Iowa, 322; *Russell v. Conway*, 11 Call. 93; *Morris v. Hollis*, 2 Harr. (Del.) 4; *Duncan v. Bloomstock*, *supra*, and note to the case in 13 Am. Dec. 728.

The power of set-off being equitable will be exercised in all cases to promote substantial justice, and rests in the discretion of the court. *Rowe v. Langley*, 49 N. H. 397; *Simson v. Hart*, 14 Johns.

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63; *Brown v. Hendrickson*, 39 N. J. Law, 239; *Burns v. Thornburgh*, 3 Watts, 78; *Baker v. Hoag*, 6 How. Pr. 201. Whether the set-off was allowed at the Trial Term as a matter of right, or upon equitable grounds as a matter of justice, does not appear from the case. The question being one of justice resting in the judgment of the court upon all the facts at the trial, the case is discharged, to be disposed of at the Trial Term on the suggestions made.

Case discharged.

SMITH and OLARK, JJ., did not sit; the others concurred.

WEBSTER V. BUSS.

(31 N. H. 40.)

Contract — restraint of trade.

An agreement to relinquish a business and not carry it on thereafter, "in the vicinity of Marlborough," is not invalid, although unlimited as to time.*

ACTION on a bond. The opinion states the facts.

C. B. Eddy and C. F. Webster, for plaintiff.

Batchelder & Faulkner, for defendant.

STANLEY, J. The defendant, in consideration of \$1,100 paid to him by the plaintiff, sold to the plaintiff his teaming property, and agreed to entirely relinquish to the plaintiff his teaming business in the vicinity of Marlborough over the route theretofore occupied by him, and in no way, directly or indirectly, to interfere therewith or cause it to be interfered with. The agreement was limited as to place, but unlimited as to time. It was made upon an adequate consideration, and was valid. This doctrine is established both in England and in this country. *Davis v. Mason*, 5 T. R. 118; *Bunn v. Guy*, 4 East, 190; *Proctor v. Sargent*, 2 Man. & G. 20; *Mallan v. May*, 11 M. & W. 652; *Watson v. Whitley*, 2 Exch. 611; *Broad v. Jollyfe*, Oro. Jac. 596; *Green v. Price*, 13 M. & W. 695; *Hitchcock v. Coker*, 1 N. & P. 796; *Price v. Green*, 16 M. & W. 346; *Chappel v. Brockway*, 21 Wend. 157; *Ross v. Sadgbeer*, 21

*See *Cook v. Johnson*, 47 Conn. 175; s. c., 36 Am. Rep. 64

Wend. 166; *Pierce v. Fuller*, 8 Mass. 223; s. c., 5 Am. Dec. 102; *Perkins v. Lyman*, 9 Mass. 522; *Palmer v. Stebbins*, 3 Pick. 188; s. c., 15 Am. Dec. 204; *Davis v. Barney*, 2 Gill & Johns. 382; *Guerand v. Dandelest*, 32 Md. 562; *Pierce v. Woodward*, 6 Pick. 206; *Butler v. Burlison*, 16 Vt. 176; *Blanchard v. Weeks*, 34 Vt. 589; *Hedge v. Lowe*, 47 Iowa, 137; *Navigation Co. v. Wright*, 6 Cal. 258; 8 Cal. 585; *Elves v. Crofts*, 10 C. B. 241; *Pember-ton v. Vaughan*, 10 Q. B. 87; Benj. Sales, 520 and notes, and notes to *Palmer v. Stebbins*, *supra*; *Eastern Express Co. v. Meserve*, 60 N. H. 198. .

The defendant contends that Webster having sold the property and now having no interest in the business, and there having been no breach of the agreement while he owned the business and carried it on, there can be no recovery. But the defendant agreed that he would in no way, directly or indirectly, interfere with the business or cause it to be interfered with. He has directly interfered with it, and there is a breach of the bond and a cause of action. But the defendant says that this action cannot be maintained for the benefit of Elwell; that the bond was given for the personal protection of the plaintiff so long as he carried on the business; and that the fact that it runs to him alone, and not to his heirs and assigns, is conclusive on this point. In *Pember-ton v. Vaughan*, *supra*, DENMAN, C. J., says: "There is no case which decides that an agreement in restraint of trade is illegal, because it is for life. It does not follow that the plaintiff will not require the protection of the agreement because he may not himself continue in the business. He may sell it on better terms on account of the protection secured to it by such an agreement."

In *Elves v. Crofts*, *supra*, the defendant covenanted that he would not carry on the trade of a butcher within five miles of the premises described in a lease assigned by him to the plaintiff. The defendant pleaded that the plaintiff had discontinued the business before the alleged breaches, also that his term had ceased; and he contended that there was no implied condition in a covenant of this sort that it shall cease to bind the covenantor when no longer useful to the covenantee. WILDE, C. J., delivering the judgment of the court, said: "A restriction necessarily limited as to space, but enduring for the life of the party restrained, is valid, as the only effectual mode of securing to the covenantee the full benefit of the good-will of his trade. It is no longer therefore open to

argument, that a restriction as large in its terms as is contained in the covenant in question is invalid. It is suggested that as this decision is based on the assumption that such a restriction is necessary for the entire protection of the covenantee, it must be construed as ceasing to operate where the covenantee has ceased, by himself or his assigns, to carry on the business assigned. This reasoning is fallacious. If the covenant is binding to its full extent when made, its signification cannot be varied by any subsequent occurrence; and to hold otherwise would be to render its import uncertain, and to impair its efficiency for that protection which the law contemplates as just. Cases may be conceived in which, notwithstanding that the covenantee had ceased to carry on the trade or business either by himself or his assigns, the good-will might not be at once extinguished; and if considerations of time or degree be permitted to affect the right to enforce such a covenant, its value would be diminished, and the salable quality of good-will, which according to all the recent authorities is deserving of protection, would be affected."

The plaintiff's purchase was not confined to the articles of tangible property. It included the good-will of the business; and this was susceptible of valuation, and capable of transfer with the rest of the property to whomsoever the plaintiff might choose. Story, Part., § 99; Pars. Part. 262.

In *Hitchcock v. Coker*, 1 N. & P. 814, TINDAL, C. J., said: "The good-will of a trade is a subject of value and price. It may be sold; bequeathed, or become assets in the hands of the personal representatives of a trader. And if the restriction as to time is to be held to be illegal if extended beyond the period of the party by himself carrying on the trade, the value of such good-will, considered in those various points of view, is altogether destroyed." There is no reason therefore for holding the restriction to extend only to the time that the vendees continued their joint interest.

But it is claimed that the defendant's agreement was personal; that it only applied to the plaintiff; and when his interest in the property and business ceased, the defendant's liability on the bond was at an end. The agreement to relinquish the business formed a material part of the purchase; it constituted in part an inducement to the purchase, and enhanced the value of the property purchased. There is no reason why the plaintiff should not avail himself of the agreement in effecting a sale. It is of no consequence whether the agreement could be transferred without the

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property. That question does not arise here. There seems no doubt, upon the authorities, that it could be transferred with and as an incident of the property, and these authorities are supported by reason, the nature of the property, and the business. *Guerand v. Dandeleit*, 32 Md. 562; *Navigation Co. v. Wright, supra*; *Pemberton v. Vaughan*, 10 Q. B. 87; *Watson v. Whitney, supra*. In the last case it was held that a suit might be brought by the executors of the obligee for a breach arising after his death.

The only case cited sustaining the defendant's position is *Hillman v. Shannahan*, 4 Or. 163; s. c., 18 Am. Rep. 281. In that case the court do not allude to the English cases on this subject, nor indeed to any of the American cases, except *Navigation Co. v. Wright*, and they draw a distinction between the two, based on the fact that in one case the word "heirs" is used while in the other it is not, and the court make a difference in the principle governing them. The reasoning of the court in *Hillman v. Shannahan* is not sufficient to overbalance the authorities which maintain the opposite view.

The evidence objected to was competent as tending to show that Elwell had an interest in the subject-matter of the suit. The suit being for his benefit this was material. If he had no interest he was not entitled to damages. It was also competent as showing what the plaintiff sold and what Elwell bought.

The action can be maintained, and the plaintiff may recover for the use of Elwell such damages as Elwell has sustained by the breach of the bond by the defendant, and such as may be presumed to have been in the contemplation of the parties when the bond was made. *Noyes v. Blodgett*, 58 N. H. 502, and authorities.

Case discharged.

ALLEN. J., did not sit; the others concurred.

MARCY V. AMAZEEN.

(61 N. H. 131.)

Gift — inter vivos — trust — bank deposit.

Where one deposits money in a bank in another's name, but subject to his own order, and without notice to the other, and retains the pass-book and control of the fund, this is not a gift *inter vivos* nor a trust.

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BILL by administrator for instructions. The opinion shows the facts.

J. S. H. Frink, for plaintiff.

C. E. Batcheller, contra.

STANLEY, J. [Minor matter omitted.] The facts necessary to establish a valid gift to Mary have been found. The donor's actual delivery of the book to her, with the intention of conveying the title, and her acceptance of it, made the transaction a gift *inter vivos*. *Reed v. Spaulding*, 42 N. H. 114, 119; *Craig v. Kittredge*, 46 N. H. 57; *Sanborn v. Goodhue*, 28 N. H. 48, 56; s. c., 59 Am. Dec. 398; *Marston v. Marston*, 21 N. H. 491; *Davis v. Ney*, 125 Mass. 590; s. c., 28 Am. Rep. 272; *Gerrish v. Inst. for Savings*, 128 Mass. 159, 163; s. c., 35 Am. Rep. 365; *Hill v. Stevenson*, 63 Me. 364; s. c., 18 Am. Rep. 231.

There was no delivery or acceptance of the other bank-books. The fact that the father made deposits in the names of his children, but retained possession of the books without notice to them, and without any declaration of his intention, except that the deposits should be subject to his order, is not a sufficient basis for finding that he intended them as gifts to his children. Retaining the title, and having the right to dispose of the money as he saw fit, he did not make a gift of these two books. *Cummings v. Bramhall*, 120 Mass. 552, 564. Nor did he on this evidence create a binding trust in favor of his children. If a trust at all, it was executory and without consideration. No beneficial interest vested in the *cestuis que trust*. *Bartlett v. Remington*, 59 N. H. 364. They had no knowledge of the arrangement, and were not parties to it. It was a voluntary disposition of his own property. If notice to the *cestuis que trust*, or donees, was not an essential element of the supposed trust or gift, and if the retention of the pass-books by the donor is not inconsistent with the completeness of the act — *Martin v. Funk*, 75 N. Y. 134, 143; s. c., 31 Am. Rep. 446; and *Blasdell v. Locks*, 52 N. H. 238, 243 — still there must be some evidence of the donor's intention to create a trust or to make a gift, before either can be said to exist. *Brabrook v. Bank*, 104 Mass. 228; s. c., 6 Am. Rep. 222; *Clark v. Clark*, 108 Mass. 522; *Blasdell v. Locke*, *supra*; *Perry's Petition*, 16 N. H. 44; *Sheegag v. Perkins*,

4 Baxt. 273. But the fact that he attempted to make a gift and failed raises no presumption that he intended to establish a trust. The latter cannot be inferred from a radical imperfection in the former. *Milroy v. Lord*, 4 DeG., F. & J. 264, 275; *Young v. Young*, 80 N. Y. 422, 437; s. c., 36 Am. Rep. 634; Perry, Trusts, § 105; Story Eq. Jur., §§ 433, 706, 706a, 1040a; *Antrobus v. Smith*, 12 Ves. 43; *Gardner v. Merritt*, 32 Md. 78.

The question is, whether the depositor's intention to establish a trust in favor of his children is proved by competent evidence. As there is no express declaration of a trust, as the by-laws of the bank, which became a part of his contract of deposit, are consistent with the idea that he was placing his money there for himself — *Howard v. Savings Bank*, 40 Vt. 597 — and as he retained the bank-books without notice to the defendants or to any one for them, and caused an entry to be made on the bank ledger showing that the money was payable to his own order, his intention to create a trust cannot be found.

Case discharged.

SMITH, J. did not sit; the others concurred.

CROCKER V. HILL.

(61 N. H. 345.)

Landlord and tenant — liability to rebuild in case of fire — covenant.

A lessor covenanted to make all necessary repairs upon the outside of the buildings upon the demised premises upon notice to him, and the lessee covenanted to make all necessary inside repairs, and to leave the premises in as good condition at the end of the term, unavoidable casualties excepted. There were mutual covenants that if the buildings should be destroyed or made untenable by fire, either party might terminate the lease upon notice to the other. The buildings were destroyed by fire during the term, and the lessee made demand upon the lessor to rebuild them, and he neglected to rebuild in a reasonable time, neither party giving notice to terminate the lease. *Held*, that the lessor was liable for the damages in an action of covenant broken.

ACTION for breach of covenants of a lease. The head-note and opinion show the facts.

Crocker v. Hill.

Pike & Parsons, Page & Norris and Sanborn & Clark, for plaintiff.

J. Y. Mugridge and Chase & Streeter, for defendant.

ALLEN, J. By an ancient rule of construction, the defendant's covenant to make all necessary repairs on the outside of the buildings, without express exception of loss of fire or other unavoidable casualty required him to construct the outside of the stable in place of the one destroyed in a reasonable time after notice. *Earl of Chesterfield v. Bolton*, Comyns, 627; *Bullock v. Dommitt*, 6 T. R. 650; *Brecknock v. Pritchard*, 6 T. R. 750; *Green v. Eales*, 2 Q. B. 225; *Myers v. Burns*, 35 N. Y. 269; *Leavitt v. Fletcher*, 10 Allen, 121; *Wood Land. and Ten.* 599, 600. So far as this rule of construction can be regarded as a mere arbitrary and technical mode of interpretation, it has become relaxed, as working injustice and unnecessary hardship in many cases, and does not prevail. In the construction of the covenants of a lease, as of other written instruments, the intention of the parties, to be gathered from the instrument itself, from their situation, and from the subject-matter of the contract, must control. *Houghton v. Pattee*, 58 N. H. 326; *Morse v. Morse*, 58 N. H. 391; *Corwin v. Hood*, 58 N. H. 401; *Brown v. Bartlett*, 58 N. H. 511.

The defendant's covenant to make repairs was general and unqualified, and did not expressly exclude an agreement to restore the buildings in case of destruction by fire or other unavoidable casualty. In the absence of such an exception, the provision for a notice to terminate the lease in case of a loss of the buildings by fire exhibits an intention to rebuild if the notice were not given. No notice to terminate the lease was given by either party. The plaintiff's demand for repairs according to the terms of the lease, and his continued occupancy of the remaining buildings after the fire, show an intention to continue the lease. Occupancy of the stable by the defendant, and continued occupancy of the other buildings by the plaintiff, in the absence of an agreement to that effect, show an exclusion of the plaintiff from a part of the leased premises. Having made a covenant, which required him to rebuild the stable within a reasonable time after the fire, and which he did not perform, and having failed to excuse himself for non-performance by giving the plaintiff seasonable notice to quit the premises,

the defendant is liable for the damages occasioned by his breach of the covenant. The defendant cannot complain of the hardship imposed upon him of repairing a loss for which he was not responsible and in no fault; for it was a hardship assumed by himself in his covenant, and against which he might have contracted, or from the burden of which he might have escaped by giving the notice provided for to terminate the lease. *Wallon v. Waterhouse*, 2 Saund. 422, note; *Dermott v. Jones*, 2 Wall. 1, 7, 8.

The damages for the breach of the covenant to make necessary repairs was the actual loss to the plaintiff by reason of the breach. He is entitled to recover such a sum as will place him in as good a position as he would have been in if the defendant had performed his covenant. *Smeed v. Ford*, 1 E. & E. 602; *Alder v. Keighley*, 15 M. & W. 117; *Dunlop v. Higgins*, 1 H. L. 381; *Robinson v. Harman*, 1 Exch. 853; *Mack v. Patchin*, 42 N. Y. 167; s. o., 1 Am. Rep. 506; *Hexter v. Knox*, 63 N. Y. 561. The defendant would have performed his covenant if he had constructed the outside of the stable for the plaintiff's use in a reasonable time. The plaintiff's loss for being deprived of the use of the stable for the remainder of the term is found to be \$1,104. This loss did not all arise from the breach of the defendant's covenant. Had he performed the covenant, the plaintiff could not have enjoyed the use of the building, nor received profit from it, without first reasonably finishing the inside at an outlay of \$654. Though the defendant gave him no opportunity to do this, the performance of the defendant's covenant by finishing the outside of the building would have left the plaintiff in no position to enjoy the benefits of the stable until he should first incur the expense of finishing the inside. The position the plaintiff would have had by the performance of the defendant's covenant measures the limit of the plaintiff's loss by non-performance, and that was the total loss from deprivation of occupancy, diminished by the expense of doing what was necessary to occupancy, and what the plaintiff had covenanted to do, namely, to finish the inside. Making this deduction, there remains \$450 as the plaintiff's actual loss arising from the defendant's breach of covenant; and for that sum and interest there must be

Judgment for the plaintiff.

STANLEY, SMITH and BLODGETT, JJ., did not sit; the others concurred.

State v. Albee.

STATE V. ALBEE.

(61 N. H. 435.)

Criminal law—prisoner's right to change of venue.

At common law the venue in a criminal case may be changed on application of the prisoner.

MOTION for change of venue.

The Attorney-General and E. P. Dole, solicitor, for State.

D. H. Woodward, E. L. Cushing and C. B. Eddy, for respondent.

SMITH, J. In *State v. Sawyer*, 56 N. H. 175, we denied the respondent's motion for a change of venue. The motion was made in the Superior Court while the indictment was pending in the Circuit Court and there had been no transfer of any question of law. We denied the motion on the ground that we could not interfere with the order of business in the Circuit Court, also because the respondent produced no evidence in support of his motion. Upon the constitutional question whether the court had the power to order a change of venue we contented ourselves with this single remark: "As at present advised we think no power exists in any court, under article 17 of the bill of rights, to order such change of venue." The question was not argued by counsel and was decided principally upon the ground first mentioned. The question did not receive the deliberate attention of the court, coming before it in the informal way it did. We feel at liberty therefore to consider the question of a change of venue as an open one, and without being embarrassed by our action in 1875.

The respondent, indicted for embezzling the funds of a savings bank, moves for a change of venue upon the ground that he cannot have a fair and impartial trial in the county where the offense is charged to have been committed. A hearing upon this motion has been had at the trial term, and the court has found "that there is good reason to believe that the respondent cannot have a fair and impartial trial" in this county, and has ordered a change of venue subject to the opinion of the full court upon the power of the court to make such order. The finding that "there is good reason to

believe," etc., is a sufficient finding of the fact that an impartial trial cannot be had. *Rex v. Hunt*, 3 B. & Al. 444; *Cochecho Railroad v. Farrington*, 26 N. H. 428, 445; *Hillhard v. Beattie*, 58 N. H. 112; 1 Bish. Cr. Proc., §§ 68-76.

The seventeenth article in our bill of rights is as follows: "In criminal prosecutions the trial of facts in the vicinity where they happen is so essential to the security of the life, liberty and estate of the citizen, that no crime or offense ought to be tried in any other county than that in which it is committed, except in cases of general insurrection in any particular county, when it shall appear to the judges of the Superior Court that an impartial trial cannot be had in the county where the offense may be committed, and upon their report the legislature shall think proper to direct the trial in the nearest county in which an impartial trial can be obtained."

In the trial of civil causes, by the policy of the ancient law, the jury was to come from the neighborhood of the vill or place where the cause of action was laid in the declaration. Living in the neighborhood, they were the very country or *pais* to which the parties had appealed, and were supposed to know beforehand the characters of the parties and witnesses, and therefore they better knew what credit to give the testimony. But this convenience was overbalanced by another very natural and almost unavoidable inconvenience: that jurors coming out of the immediate neighborhood would be apt to intermix their prejudices and partialities in the trial. To remove this difficulty, England, by successive statutes, abolished the requirement as to the number of hundredors there should be upon the panel, until it was finally enacted by the Statute 24 George II, chapter 18, that in all actions, civil and criminal, the jury should come from the body of the county at large, and not from the particular neighborhood. 3 Bl. Com. 359, 360. By the common law the general rule was, that all offenses must be inquired into, as well as tried, in the county where the fact is committed. 4 Bl. Com. 305. That learned commentator said: "Our law has therefore wisely placed this strong and twofold barrier of a presentment and a trial by jury between the liberties of the people and the prerogative of the crown. * * * The founders of the English law have with excellent forecast contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether pre-

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ferred in the shape of indictment, information, or appeal, should afterward be confirmed by the unanimous suffrage of twelve of his equals and neighbors indifferently chosen, and superior to all suspicion." 4 Bl. Com. 349, 350. The sheriff is required to "return a panel of jurors, *liberos et legales homines, de vicineto*, that is, freeholders, without just exception, and of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed." 4 Bl. Com. 350; 2 Hale P. C. 264; 2 Hawk. P. C. 403.

As the right of trial by a jury *de vicineto*, or of the *visne* or neighborhood, was given for the protection of the subject, so the power was early given to the Court of King's Bench for the protection also of the subject to remove the venue upon a suggestion duly supported that a fair and impartial trial cannot be had. 3 Bl. Com. 294; 3 Bl. Com. 350; 4 Bl. Com. 350; *Mayor of Poole v. Bennet*, 2 Str. 874; Rosc. Ev. 241; *Rex v. Holden*, 5 B. & Ad. 347; *Rex v. Harris*, 3 Bur. 1330; 1 Bish. Cr. Proc., §§ 68-76. Chitty says: "At common law the venue should always be laid in the county where the offense is committed." 1 Chit. Cr. L. 177. "And even the king cannot by charter authorize the trial of an offense in another county." 1 Chit. Cr. L. 190; 60 Co. Lit. 125, *a* and *b*, *n*. 1; Hawk. b. 2, chap. 25, § 35. "At common law, when a fair and impartial trial cannot be obtained, and the indictment has been removed into the King's Bench by *certiorari*, the court have a power of directing the trial to take place in the next adjoining county when justice requires it." 1 Chit. Cr. L. 201; *Rex v. Nottingham*, 4 East, 210. This rule of the common law, securing to the subject the right of trial in criminal prosecutions in the vicinity where the facts happen, as a protection to him against the power of the king, the framers of our Constitution undertook to embody in that instrument as a protection to the citizen against the power of the State and of either department of its government. Massachusetts previously incorporated a similar provision in her declaration of rights, adopted in 1780. Article 13 reads as follows: "In criminal prosecutions, the verification of facts in the vicinity where they happen is one of the greatest securities of the life, liberty, and property of the citizen." It has been held that the court, in the absence of a statute, has no power to order a change of venue in a civil action. *Lincoln v. Prince*, 2 Mass. 544; *Cleveland v. Welsh*, 4 Mass. 591; *Hawkes v. Kennebeck*, 7 Mass. 461. It has also been held that this provision is not prohibitory of a trial of an offense in any other

county than that in which it happened; nor is it affirmative of a right in the citizen to be tried in any particular county. It is merely declaratory of the sense of the people that in a criminal prosecution it is the right of the accused to require the charge to be proved in the vicinity or neighborhood where the fact happened. *Commonwealth v. Parker*, 2 Pick. 550, 553; *Commonwealth v. Cost-loy*, 118 Mass. 1.

In *Cochecho R. v. Farrington*, 26 N. H. 428, 436, it was said that the practice of the courts of England to change the venue of transitory actions "became thoroughly engrafted upon the common law long before the independence of this country; and from that time forth not only has the practice prevailed in the courts of England, but the power is now exercised by the courts of very many if not all of our States, either by force of express statute, or the adoption of the common law into the jurisprudence of the same." The act of the provincial legislature of October 16, 1692, created a supreme court of judicature, empowered to have cognizance of all pleas, civil, criminal and mixed, as fully and amply as the courts of King's Bench, Common Pleas, and Exchequer in England had. The same act created a court of common pleas with jurisdiction of all matters triable at common law where the damages did not exceed £20. In 1699 an inferior court of common pleas and a superior court of judicature were established, with the powers defined in the act of 1692. The act of 1699 remained in force until 1771, when the State was divided into counties, and superior and inferior courts established with the same jurisdiction as the courts established by the act of 1699 had. The judiciary acts of 1791, 1813, 1816 and 1832 conferred upon the courts thereby established the authority and powers previously held and exercised by the courts which they superseded, and substantially the same as those incorporated in chapters 171 and 172 of the Revised Statutes in force in 1853, when *Cochecho R. v. Farrington*, was decided. It was held in that case that under the provincial government, after the division into counties, the Superior Court and Common Pleas possessed the same power to change the venue as did the courts of England (p. 438), and therefore that the courts in 1853 had the power to change the venue in civil actions in proper cases. *State v. Rollins*, 8 N. H. 550, decided that the body of the common law, and the English statutes in amendment of it, so far as they were applicable to our institutions and the circumstances

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of the country, were in force here upon the organization of the provincial government, and have been continued in force by the Constitution, so far as they are not repugnant to that instrument, until altered or repealed by the legislature. This decision was reaffirmed in *Cochecho R. v. Farrington, supra*. The judiciary acts of 1855, 1859, 1874 and 1876 did not abridge the powers of the courts, but conferred upon them jurisdiction of pleas, civil, criminal and mixed, as full and ample as that previously exercised by the courts of this State.

There remains the question whether by implication the power to order a change of venue in criminal actions is limited to the single contingency mentioned in article 17 of the Bill of Rights. Lord CAMPBELL remarked that great caution should be observed in dealing with the maxim "*Expressio unius*," etc., for the question of its application depends upon the intention of the party as discoverable upon the face of the instrument or of the transaction. *Saunders v. Evans*, 8 H. L. Cas. 729. The object of the framers of the Constitution, as already remarked, was to protect the subject against an unfair trial at a distance from the vicinity of the alleged crime and at a place selected by officials who might be hostile to the accused. Hence the trial is required to take place in the county where the crime is charged to have been committed, so that the accused may have the benefit on his trial of his good character and standing with his neighbors, if he has preserved them, and the benefit of such knowledge as the jury may possess of the witnesses who may give evidence against him; besides he will be able with more certainty to secure the attendance of his own witnesses. These are reasons why a fairer trial may be had in the vicinage of the fact than in a distant county. But this is not universally true. Occasions sometimes occur when from a combination of circumstances popular prejudices are aroused, and bitterness of feeling fills the popular mind. Jurors, because they are human, may be swayed by an unjust public sentiment, and may be influenced by public prejudices. It is not reasonable to suppose that the convention that formed the Constitution of 1784 understood that such a state of popular feeling could only arise during a time of general insurrection, or intended that an accused citizen should be subjected to the expense, delay and annoyance of procuring the legislative sanction to a change of venue, and that only after a report of the judges of the Superior Court. Men who had

enjoyed this protection under the British crown would not be likely to surrender it after engaging in an exhaustive war for seven years to establish their independence. One of their grievances was the trampling under foot of the time-honored principle that trials for crime must be by a jury of the vicinaga.

The benefit of statutory and constitutional provisions, both in civil and criminal jurisprudence, may be waived by a party interested. 1 Bish. Mar. & Div. 677; *State v. Curney*, 37 Me. 156; 1 Bish. Cr. L., § 995. A person ought not to be heard to complain of that to which he has consented. For instance he may not object to the grand jury after he has pleaded to the indictment; nor challenge a petit juror for a known cause after verdict; nor object after trial that a copy of the indictment was not furnished him, when the statute requires it; nor that inadmissible evidence was received without objection; nor that the jury separated after verdict with his consent. 1 Bish. Cr. L., §§ 996, 997. These are familiar examples of the waiver of well-recognized provisions, intended for the protection of a party. The cross-examination of a prisoner who volunteers himself as a witness is permissible, because by electing to testify he subjects himself to the scrutiny of a cross-examination, and consents to waive the constitutional provision that no subject shall be compelled to accuse or furnish evidence against himself. *Connors v. People*, 50 N. Y. 240; *Brandon v. People*, 42 N. Y. 265; *State v. Archer*, 54 N. H. 465. Mr. Bishop says: "If the defendant has consented to any step in the proceedings, or if it has been taken at his request, or he did not object to it at the proper time when he might, he cannot afterward complain, however contrary it was to his constitutional, statutory or common-law rights. * * * In judicial proceedings this doctrine of waiver is a necessity; for without it they would rarely be carried on with success." 1 Bish. Cr. L., §§ 118, 119. Of the soundness of the decisions in *Cancemi v. People*, 18 N. Y. 128, and other cases of that class in which the right of waiver has been denied, we express no opinion.

Whatever doubts may have existed of the right of a prisoner to waive statutory and constitutional provisions enacted for his protection, they may have arisen from the fact that anciently a prisoner on trial for a capital crime was not allowed counsel except to debate a point of law if one should arise. The duty of the judge to act as counsel for him usually consisted in seeing that the pro-

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ceedings were regular and strictly legal. 4 Bl. Com. 355 Mr. Bishop says, "the consequence of which was that as the law does not suffer a party to be prejudiced by an act of the court, if one through the advice or oversight of the judge omitted to make an available objection or consented to relinquish a right, this was deemed error of law of which he could take advantage. In this way the rule would become established that a particular right could not be waived; and when afterward counsel were allowed prisoners, and the judges ceased to advise them, it might not be obvious whether or not the rule denying waiver would cease also in these altered circumstances in obedience to the maxim, '*cessante ratione legis, cessat ipsa lex.*'" 1 Bish. Cr. Proc., § 120.

A statute allowing a change of venue is not void as conflicting with the constitutional right to be tried in the county where the prisoner is indicted. 1 Bish. Cr. Proc., § 50; *Dula v. State*, 8 Yerg. 511; *Pertcet v. People*, 70 Ill. 171. But the change can only be made with his consent. *State v. Denton*, 6 Cold. 539; *Wheeler v. State*, 24 Wis. 52; *Dougan v. State*, 30 Ark. 41; *Cochrane v. State*, 6 Md. 400; *Bramlett v. State*, 31 Ala. 376; *State v. Gut*, 13 Minn. 341; *Gut v. State*, 9 Wall. 35; 1 Bish. Cr. L., §§ 995-998; Cooley Const. Lim. 319 and note.

It is the respondent's privilege to be tried in the county where the offense was committed. This provision in our Bill of Rights, designed for the protection of the accused, was regarded by the framers of the Constitution as a privilege of the highest importance, because it would prevent the possibility of sending him for trial to a remote county, at a distance from friends, among strangers, and perhaps among parties animated by prejudices of a personal or partisan character. *Gut v. State, supra*, 37. But they did not intend to destroy his common-law right to a change of venue whenever a fair and impartial trial could not be had in the county where the fact happened. The purpose of this constitutional provision was the protection, not the destruction, of individual rights. The constitutional provision is an affirmation of the prisoner's common-law right not to be tried at a distance from the county in which his offense is charged; and this common-law and constitutional right he may waive for the purpose of securing the fair trial which the Constitution guarantees. A change of venue under such circumstances is calculated to preserve the system of jury trial in its purity

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and thereby to increase the confidence of the community in its safety and usefulness.

Whether the emergency named in article 17 of the Bill of Rights would present an occasion which can be improved by the State, or by the State alone, to obtain a change of venue, and would be the only occasion on which the State can move for a change, we do not need to inquire. Our conclusion is, that on the facts proved by the respondent, his motion can be granted.

Case discharged.

CARPENTER, J., did not sit; the others concurred.

STATE v. BUTMAN.

(51 N. H. 511)

Criminal law — embezzlement — of firm moneys by partner.

A member of a firm may not be indicted for embezzling the partnership funds.

INDICTMENT for embezzlement. The opinion states the point.

A. S. Batchellor, W. H. Cotton and J. M. Shirley, for State.

J. L. Spring, for respondent.

SMITH, J. The statute on which this indictment is founded reads as follows: "If any officer, agent or servant of any corporation, public or private, or the clerk, servant or agent of any person, shall embezzle or fraudulently convert to his own use any money, bill, note or other effects or property whatever of such person or corporation, or in their possession or keeping, or shall knowingly or voluntarily pay or deliver any such money, bill, note, security for money, evidence of debt, or other effects or property to any person, or to the order of any person, knowing that such person is not entitled to receive the same, he shall be fined not exceeding \$2,000 and imprisoned not exceeding five years." G. L., chap. 275, § 8. The operation of the statute is not to be extended to cases within the mischief intended to be suppressed, if they are not at the same time within its terms fairly interpreted. *Wood v. Erie Ry. Co.*, 72 N. Y. 196; s. c., 28 Am. Rep. 125; *United States v. Wiltberger*, 5 Wheat. 76; 2 Bish. Cr. L., § 331.

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It is contended, on behalf of the State, that partners being in law the agents of the firm, the statute is broad enough to include a partner who embezzled the property of his firm. This conclusion by no means follows. Words in statutes are to be read in their popular, natural and ordinary sense. *Birks v. Allison*, 13 C. B. (N. S.) 23; Broom Leg. Max. 570. If the legislature intended to use the word "agent" in the sense contended for, it was unnecessary to insert the words "officer," "clerk" or "servant," for an officer or servant of a corporation is its agent for some purposes, and the clerk or servant of a person is his agent for the discharge of duties within the sphere of his employment. If it was the legislative intent to include partners in the statute, it is not easy to understand why they were not mentioned, or why the intent was left to be discovered by implication.

The statute 24 and 25 Vict., chap. 96, § 68, provided for the punishment of embezzlement by a clerk or servant of the property of his master or employer. Under this statute it has been held that a member of a friendly society could not be convicted of embezzling money taken by him on sales of tickets for a railway excursion, which he was appointed by the society to manage. The decision went upon the ground that he was a joint owner of the money (the property of the society not being vested in trustees), and that he was not a clerk or servant within the meaning of the statute. In *Reg. v. M'Donald*, L. & C. 85, the prisoner was cashier and collector to commission merchants, and was paid partly by salary and partly by a percentage on the profits, but was not to contribute to the losses; and he had no control over the management of the business. It was held that while there might be a partnership in the business as to third persons, there was none *inter sese*, and being a servant he was held liable for embezzling the property of his employers. See also 2 Bish. Cr. L., §§ 341, 343; *Holmes' case*, 2 Lew. 256; *Regina v. Diprose*, 11 Cox C. C. 185; *Regina v. Proud*, L. & C. 97. To meet what was considered a defect in England in its laws for the detection and punishment of embezzlement, the statute 31 and 32 Vict., chap. 116, § 1, was passed, punishing embezzlement by a member of a copartnership of its money, effects and property. In *Commonwealth v. Bennett*, 118 Mass. 443, the respondent was not a partner, and the ruling that he could not be convicted of the embezzlement charged if he supposed when he took the money that he was a partner, was held sufficiently favorable to him.

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We have not been referred to any decision, and we have not in our investigations discovered one, which holds that a partner may be convicted of embezzling the property of the copartnership under a statute similar to ours. The crime of embezzlement is purely statutory, originating in attempts to amend the law as to larceny. Further legislation is necessary to reach the case of embezzlement by one partner of the property of the firm.

The other count charges that the respondent, being the partner of Thompson, embezzled the property of Thompson. This is not sufficient. *Non constat*, that being a partner with Thompson he was his clerk, servant or agent, and came into the possession of Thompson's corn and grain as such clerk, agent or servant.

Indictment quashed.

STANLEY, J., did not sit; the others concurred.

NORTON V. DERBY NATIONAL BANK.

(61 N. H. 509.)

Banks — National — guaranty of contract between third persons.

No action may be maintained against a National bank upon a contract made by its cashier on its behalf to guarantee a contract between third persons for delivery of building materials.

ACTION on a guaranty. The head-note and opinion show the necessary facts.

Wiggin & Fuller, for plaintiff.

G. C. & G. K. Bartlett, for defendants.

ALLEN, J. The defendants' cashier had no authority to make the guaranty, and there was nothing in the acts, conduct, or course of business of the defendants' officers, by which he was held out as having authority to make it. The guaranty itself being false and a fraud upon both parties, the cashier undertook to cure one fraud by committing another, and recorded a false vote of authority to make the guaranty, and certified the false record to the plaintiff.

Had the forged record been a true one, had the directors voted as the record and certificate declared, or had they made the guar-

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anty themselves, the defendants could not have been bound by their action, for a guaranty of that kind would have been beyond the scope of their powers. The power of corporations is limited by the purposes for which they are created, and which are named in the charter or act authorizing their existence. National banks derive their powers from what is known as the National Banking Law (Act of Congress, June 3, 1864, Rev. St. U. S., title LXII), declaring that any association organized under the act shall be a body corporate, and "may exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as may be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title." Real estate may be purchased and held for immediate accommodation in the transaction of business, and received in the collection of debts, and as security for previous indebtedness. Rev. St. U. S., §§ 5136, 5137. The power given by the law is to carry on the banking business, and includes such incidental powers as may be necessary to effect that object. It is nowhere mentioned that a bank may guarantee the performance of written contracts made for other purposes than the payment of money or the transfer of securities. If in the course of their business, the bank find it necessary to indorse for transfer, or otherwise specially guarantee negotiable commercial paper (*People's Bank v. National Bank*, 101 U. S. 181), it will not be claimed that the guaranteeing of other written contracts is included within any of its powers, general or special, or is necessarily incidental. It is no part of the business of a bank, nor necessarily incidental to it, to guarantee a building contract, or one for furnishing building materials; and the defendants had no power to make the guaranty which is the subject of this action.

The plaintiff claims that the defendants are liable, because it was the duty of their cashier and clerk to record the votes and official acts of the directors, and the bank are bound by the false record as if it were true; or that the plaintiff in good faith parted with her property, relying upon the strength of the record and the guaranty, and the defendants are estopped from denying the truth of the record and the validity of the guaranty. The doctrine that

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principals are bound or made liable for the wrongs done by their agents or servants is confined to cases where the acts complained of, or relied on, are done in the employment of the principal as a part of the ordinary business of that employment, or are authorized or directed by the principal, or in some way ratified and adopted by him. Acts, though done by an agent or servant, unauthorized and unratified, and not being within the scope of the employment, nor a part of the ordinary business of the principal, cannot bind him nor make him liable; and the doctrine applies with special force to corporations, the business of which can be carried on only through the medium of agents. *Ang. & Ames Corp.*, §§ 310, 311; *Add. Torts*, § 1197; *Martin v. Great Falls M'fg Co.*, 9 N. H. 51, 54; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; s. c., 9 Am. Dec. 111; *Foster v. Essex Bank*, 17 Mass. 479, 508; s. c., 9 Am. Dec. 168; *Mechanics' Bank v. Bank of Columbia*, 5 Wheat. 326; *Bank v. Dunn*, 6 Pet. 51; *Bank v. Jones*, 8 Pet. 16; *United States v. City Bank of Columbus*, 21 How. 356. The defendants' cashier had no authority to make the guaranty, nor was his act in making it ever ratified by the defendants. The directors in fact repudiated it as soon as it came to their knowledge. It was no part of the duty of the cashier to make the guaranty, nor was its making any part of the ordinary business of the bank. Nothing of the kind was shown to have ever been done before, either with or without express direction. It was not within the legalized powers of the defendants.

The fact that it was a part of the duty of the cashier to record the acts and votes of the directors does not make his false record and certificate binding upon the bank. The cashier is not a public officer within the meaning of the term, appointed by the public to make and certify records, and whose duties are defined by law. If he was held out by the defendants as their agent to record and show the acts of their officers, the plaintiff was not relieved of the duty of making inquiry into the legality and want of authority of the acts. The doctrine, that of two innocent persons defrauded by a third, he shall suffer who has enabled a delinquent to commit the fraud, has no application here, where the act constituting the fraud was no part of the cashier's duty nor the defendants' legitimate business, and where the plaintiff neglected to make the necessary inquiry for ascertaining the validity of the act.

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The doctrine of *ultra vires* is not usually applied where the party setting it up has received a benefit from the unempowered and unlawful act relied on as a defense. *Rich v. Errol*, 51 N. H. 350, 354; *West v. Errol*, 58 N. H. 233; *United States v. State Bank*, 96 U. S. 33; *Gold Mining Co. v. National Bank*, 96 U. S. 640; *National Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99. The defendants received a tract of land, which the plaintiff conveyed, relying for payment of the consideration on the guaranty of the defendants. The guaranty, the conveyance, and the pledge of the note and mortgage were parts of the same transaction, and though the land was not received directly from the plaintiff, it was the false guaranty which induced and made possible the conveyance, and which enabled the bank to collect the overdraft of Lamprey. It was a benefit received from the guaranty, and the defendants cannot be permitted to repudiate the unauthorized contract and retain the fruits of it. If the guaranty is denied, the benefit must be restored. The plaintiff cannot recover upon the guaranty. If he desires he may amend his declaration by adding an appropriate count for the recovery of the land, or its value if sold.

Case discharged.

SMITH and CARPENTER, JJ., did not sit; the others concurred.

CURRY V. SPENCER.

(51 N. H. 354.)

Constitutional law — taxation of legacies.

The legislature has no power to tax legacies and successions.*

BILL by executrix for instructions.

C. C. Rogers and J. Minot, for plaintiff.

Tappan, attorney-general, for State.

BLODGETT, J. It is not to be questioned that the power to tax is vested in the legislature; that it is unrestricted, except when it is opposed to some provision of the Federal or State Constitution;

*See *contra*. *Matter of McPherson* (104 N. Y. 306), 58 Am. Rep. 502.

and that it extends "to every trade or occupation, to every object of industry, use or enjoyment, and to every species of possession." Nor is it to be questioned that the subject of the taxation in the present case is one within legislative control, because inheritances, distributive shares and legacies are but creatures of the law; in fact the only right to take or dispose of property by descent or devise is derived from the sovereign power of the State through its laws. "Wills therefore and testaments, rights of inheritance and successions are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them." 2 Bl. Com. 12.

It must be conceded then that in the absence of constitutional prohibition the legislature has the power to impose conditions by way of a tax upon legacies and successions, and so the only inquiry is, whether the taxation in question is excluded either by the express terms of the Constitution or by necessary implication, because if it is not, the power of the legislature must be regarded as having been properly exercised.

An answer to the inquiry is readily afforded, for while by Article V of our Constitution the legislature is empowered to assess and levy taxes, this grant of power is expressly limited to "proportional and reasonable assessments, rates and taxes upon all the inhabitants and residents within the said State, and upon the estates within the same," and by the Bill of Rights (Art. XII) every inhabitant is bound to contribute only his share, which manifestly and according to the uniform decisions of this court for more than half a century, cannot be more than his proportional share of the common burden.

All measures for the imposition or collection of taxes must therefore conform to this general principle of just equality, and hence it is immaterial whether the tax imposed by chapter 64 is to be regarded as a tax on property or upon a civil right or privilege, for the same principle of equality and due proportion applies to every species of tax alike. And it is this consideration which broadly distinguishes the case at bar from those in Virginia and Maryland, to which our attention has been called, and in which a similar tax was sustained.

In the former State the Constitution requires that taxes on property shall be uniform, and in *Eyre v. Jacob*, 14 Gratt. 442, the objection taken was, that the property of the estate having been

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taxed, a tax on collateral inheritances must be opposed to the constitutional requirement; but the decision (by a divided court) is put expressly upon the ground that such a tax is not one on property but on the privilege of succeeding to the inheritance, and that there is in that State no constitutional prohibition against taxing a civil right or privilege, or forbidding discrimination between lineal and collateral inheritances, because the requirement of uniformity applies to property only. A similar objection was taken and overruled in *Tyson v. State*, 28 Md. 577, on the ground that the restrictions imposed upon the legislative power as to taxation are explicitly declared in the State Constitution, which only prohibits the taxation of polls and paupers, and requires a uniform mode of taxation on property according to its value; and that "whilst thus providing for a uniform mode of taxation on property, it was not the purpose of the framers of the Constitution to prohibit any other species of taxation, but to leave the legislature the power to impose such other taxes as the necessities of the government might require."

It is apparent that these decisions can have no weight in New Hampshire, and immunity from disproportional taxation being expressly reserved in our Bill of Rights, and the power of proportional taxation only being granted the legislature by the Constitution we are unaware of any ground upon which the statute under consideration can be upheld, for if it is to be regarded as a tax on property, it is open to the objection of unequal and double taxation, and if it is to be regarded as a tax on a civil right or privilege, it is discriminating and disproportional. See *State v. U. S. & Can. Express Co.*, 60 N. H. 219.

Nor is the argument that its object was "to defray the cost of Probate Courts" entitled to any weight, because the constitutional rule of equality cannot be limited or qualified by any consideration of expediency or convenience. The purpose of the act cannot change its character in this respect. Good purposes in taxation are of no consequence if the effect is to subject the tax payer to exceptional and invidious exactions.

But within the limits of legislative authority, we have nothing to do with the motives or policy of this or any other taxation, and therefore whether the expense of administering the probate law should be imposed upon the business of that office is not for us to determine. "It is only where statutes are passed which impose

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taxes on false and unjust principles, or operate to produce gross inequality so that they cannot be deemed in any just sense proportional in their effect on those who are to bear the public charges, that courts can interpose and arrest the course of legislation by declaring such enactments void." BIGELOW, C. J., in *Commonwealth v. Savings Bank*, 5 Allen 437. We therefore go no further than to say that if the legislature deems it expedient to defray the expense of Probate Courts by a tax upon the recipients of estates therein adjudicated, such tax must be proportional and constitute only the just share of those upon whom it is imposed; that it cannot lawfully make discriminations and cast the burden upon one class of beneficiaries and exempt all other classes from its operation, and that it cannot therefore for purposes of taxation exempt legacies and successions to husband, wife, children and grandchildren, and include only those by the collaterals and others than those specified.

It is true that this form of tax comes down from antiquity (Gibbon's *Decline and Fall of the Roman Empire*, chap. 6), and that the tax commissioners of this State, by whom it was recommended, say that there can be no question of the legal right to impose it (Report, p. 31); but nevertheless we entertain a contrary opinion, because under the reservations of the Bill of Rights and the limitations of the Constitution it is plainly founded upon pure inequality and is simply extortion in the name of taxation, and it can therefore never be sustained in this jurisdiction so long as equality and justice continue to be the basis of constitutional taxation.

Chapter 64 must be declared void and inoperative and the plaintiff is

Advised accordingly.

SMITH, J., did not sit; the others concurred.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

REHILL v. McTAGUE.

(114 Penn. St. 82.)

Account stated — between partners.

A statement of partnership accounts, prepared by clerks to aid in a settlement between the partners, is *prima facie* evidence, binding as to items mutually assented to at the time, but not as to disputed items.

ACTION of account. The opinion states the point.

Henry C. Boyer and George F. Baer, for plaintiff in error.

Aaron S. Swartz and John H. Fort, for defendant in error.

GREEN, J. [Omitting other matters.] The remaining assignments raise substantially the one question whether the settlement made by the three clerks in 1875 is to be regarded as "an account stated" in equity, conclusive between the parties except for fraud or mistake.

The court declined to give it a conclusive effect, but did give it much weight, and in fact held that as to all items in it which were claimed by one party and assented to by the other the party so assenting would be bound.

The treatment of this subject by the learned court below seems to us as exceedingly fair and in strict accordance with the authorities. The statement in question claimed by the defendant to be

conclusive, was not prepared by the parties or either of them; it was prepared by three of their clerks who examined the books by themselves in the absence of the parties. When they had partly finished their work they called the parties before them and asked them questions as to many matters they, the clerks, did not understand. Then they took the answers to their questions and reviewed their work, making charges and corrections and again called the parties before them. There were claims made by each partner which did not appear in the books. As to these they did not attempt to make a settlement themselves (at least so Whitman, one of the clerks, testifies), but just put down whatever each party claimed, not deciding whether it was correct or not, simply taking the partner's word for it. The testimony on this subject is too long to be repeated here, but some portions of it may be quoted. Thus Whitman, who seems to have been the most active of all, and was the spokesman in their interviews with the partner, says: "The books were brought to my place and we were told by the partners, or at least by Mr. Rehill, to try and make a statement as near as we could of how they stood. * * * We found a great many things we were curious to question them on; there were a great many charges entered twice; there was a great many bank accounts we did not understand." After stating that they took the answers of the parties and worked again for a week he adds, "at the end we made out a statement for each party. We first went over these accounts; when they came in I don't think we showed them any figures. I said there were a great many things we did not understand. I think I made the remark that from the books Mr. McTague had credit of some \$30,000 or \$40,000 more than Mr. Rehill; that Mr. McTague's credits were that much more than Mr. Rehill's; by that I meant that Rehill owed McTague; * * * when we started out to make out this account we were trying to find out how they stood between each other; the way I understood it we were instructed simply to find out how they stood in their business relations to each other; there was never any thing expressed that I knew of that it was to be a final settlement. We were to render an account showing how they stood between each other; that is the way I understood it; we gave the statement to them as we found it from their books and from their statements; made the statements as the books showed and as they claimed; * * * we gave them as they asked and took their word for it; we had nothing else.

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* * * I am not prepared to swear that these books were in such an intelligent condition that I could make up a statement from them by correcting the improper balances and additions and subtractions. * * * When I signed that statement I signed it as a correct statement as I could make out with my knowledge of book-keeping. I do not say that it is correct; after that statement had been made up, Mr. Rehill and Mr. McTague were called in and each of them was given a copy; * * * it was simply given to them as a statement of the best result we could make of the books and their claims; * * * wherever there was no evidence in the shape of books to make up the statement we took Mr. Rehill's statement; if Mr. McTague made any we considered them; * * * we took them both for what they claimed; we took their word; we had no right to dispute their word; if either party made a claim we took it at their word and put it down; that was for them to settle hereafter; we were making out a statement of their affairs as near as we could make it and simply noting where it came from; as far as the books were concerned we took the books, but there were other statements outside which we were bound to take their word for; * * * we did not dispute either of their words. * * * This statement was for the purpose of enabling them to make a settlement; that was the way I understood it; I am not prepared to answer whether the settlement was to conclude them; they were not bound by it; they did not bind themselves to stand by our conclusions; we were asked to make a statement to the best of our knowledge from all the information we could glean from them and the books; we could not get along with the account while they were there; they would dispute over a single article for a day; I think they were not agreed upon the items; * * * we had a number of different charges to deal with that did not appear in the books; this credit to Mr. Rehill is a personal statement from Rehill; when they gave us a personal statement we took it for granted that it was correct; * * * we did not take the authority to pass upon the propriety of any of these accounts; the object of putting them into the account was that they should agree and make an arrangement to settle, so that they could have the thing before them in some kind of shape; we tried to get it in tangible form; * * * we prepared statements for them to settle; we did not settle for them."

In view of the foregoing, and other testimony of a similar kind, it is impossible for us to regard the statement of 1875 as a stated

account, conclusive between the parties. It was not made by one party and delivered to the other; it was not an account alone of what appeared upon the books of the firm, but of such matters and also of mere verbal claims made by each, which were set down in the statement upon the bare assertion of the party without question, without any kind of verification, without even any attempt by the clerks to adjudicate or determine their correctness, without the assent of the opposite party, and the statement itself is not a statement of account between the partners, but between each partner and the firm. Even if it were free from these objections and were in truth an account stated between the partners, it would not be absolutely conclusive so as to be incapable of impeachment for mistake as to items under the well-established equitable right to surcharge and falsify. This right simply affects the burden of proof which in proper cases of stated account rests upon the party against whom the account is set up, the inference being that the account as stated is correct, and the duty of disproving or rebutting the inference resting upon the opposite party who otherwise might require original proof of the items of the account.

The text-books and the cases are quite uniform in their description of the stated account between partners and the effect to be given to it. Thus in 1 Collyer's Law of Partnerships, § 298 (ed. of 1878), it is said: "It is to be observed that the fact that an account has already been rendered by the defendant to the plaintiff does not deprive the latter of his right to have the same account taken under the direction of a court of equity; to have that effect an account must not only have been sent in to the plaintiff but also have been acquiesced in by him. * * * A stated account may be impeached either wholly or in part on the ground of fraud or mistake. If there be fraud, or if any mistake affects the whole account, the whole will be opened and a new account will be directed to be taken without reference to that which has been stated; but if there be no fraud, and if no mistake affecting the whole account can be shown, but the correctness of some of the items in it is nevertheless disputed, the account already stated will not be treated as non-existing, but will be acted upon as correct, save so far as the party dissatisfied with any item can show it to be erroneous. In a case of fraud an account will be opened *in toto*, even after the lapse of a considerable time; but if no fraud be proved, an account which has been long settled will not be reopened

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in toto; the utmost which the court will then do will be to give leave to surcharge and falsify." The right to surcharge and falsify is thus defined by Lord Chancellor HARDWICKE in *Pit v. Cholmondeley*, 2 Ves. Sr. 565, "the *onus probandi* is always on the party having that liberty; for the court takes it as a stated account and establishes it; but if any of the parties can show an omission for which credit ought to be, that is a surcharge; or if any thing is inserted that is a wrong charge he is at liberty to show it, and that is falsification; but that must be by proof on his side; and that makes a great difference between the general causes of an open account and where right to surcharge and falsify, for such must be made out. Now this is not only after a great length of time, but also after a number of accounts settled between the parties." In *Vernon v. Vawdey*, 2 Atk. 119, it was said: "If there are only mistakes and omissions in a stated account the party objecting shall be allowed no more than to surcharge and falsify."

In 1 Story Eq., § 523, the subject is thus presented: "If therefore there has been an account stated, that may be set up by way of plea, as a bar to all discovery and relief, unless some matter is shown, which calls for the interposition of a court of equity. But if there has been any mistake or omission, or accident, or fraud, or undue advantage, by which the account stated is in truth vitiated, and the balance is incorrectly fixed, a court of equity will not suffer it to be conclusive upon the parties, but will allow it to be opened and re-examined. In some cases, as of gross fraud, or gross mistake, or undue advantage, or imposition made palpable to the court, it will direct the whole account to be opened and taken *de novo*. In other cases, where the mistake, or omission, or inaccuracy, or fraud, or imposition is not shown to affect or stain all the items of the transaction, the court will content itself with a more moderate exercise of its authority. It will allow the account to stand, with liberty to the plaintiff to surcharge and falsify it; the effect of which is to leave the account in full force and vigor as a stated account except so far as it can be impugned by the opposing party who has the burden of proof on him to establish errors and mistakes." In section 525 the terms "surcharge" and "falsify" are defined substantially the same as in the above citation from Collyer, and in section 526 an "account stated" is described, and its effect also in a similar manner to that already given.

The learned court below treated the statement made by the clerks in accordance with the foregoing principles; they allowed it to be given in evidence, thus making it *prima facie* evidence; as to all items to which the parties assented they held it binding; to items claimed by one and assented to by the other, binding effect was given; as to disputed items and claims denied the jury were instructed to determine them according to the best light they could obtain from all the testimony; they were instructed that the statement was not conclusive, but much weight was given to it, and as we think all the consideration to which it was entitled was allowed by the court. The accounts were voluminous and somewhat complicated, and there was much dispute as to the items, or many of them. Instead of there being proof that the parties assented to the statement made by the clerks, the evidence was that they would dispute over a single item for a day, and the clerks made no attempt to adjust these disputes, but simply put down the items of adverse claims just as they were claimed and not as they were decided, for they were not decided at all. Such an account cannot in any point of view be regarded as a stated account between partners assented to either expressly or by implication.

Most of the authorities cited in the paper books are inapplicable, as they do not relate to this class of cases, and no one is in conflict with the familiar equity principles to which we have referred. Upon a review of the whole case we fail to discover any error in the treatment of the cause by the learned court below, and therefore

The judgment is affirmed.

CITY OF ALTOONA V. LOTZ.

(114 Penn. St. 236.)

Negligence — contributory — walking on defective sidewalk.

A pedestrian in a city is not necessarily negligent in walking on a sidewalk which he knows to be unsafe, in a dark night, as the nearest way to his destination, instead of taking another way which is also unsafe.

ACTION for personal injury by negligence. The opinion states the case. The plaintiff had judgment below.

A. V. Dively, city solicitor, and *A. S. Landis*, for plaintiff in error.

H. M. Baldridge, for defendant in error.

TRUNKEY, J. The defects in the sidewalk had existed so long and were so well known to the plaintiff at the time he was injured, that the sole defense is that the plaintiff failed to show a case clear of contributory negligence. This defense would prevail had there been a safe and practical way by which the plaintiff could have reached his home. It is not alleged in the points submitted by the defendant, that there was a safe way; only a suggestion that the plaintiff could have conveniently found a safer way in the street.

The jury were explicitly and repeatedly instructed that if the plaintiff failed to show a case clear of contributory negligence he could not recover. And their attention was so fairly directed to the testimony touching the question, and all the rulings of the court at the trial were so unexceptionable, that the defendant complains of nothing save that its second, third, fourth and eighth points were refused, which points involved the finding of the fact of contributory negligence by the court, and the direction of a verdict for the defendant.

The defendant's second point is as follows: "The plaintiff's testimony showing that he well knew of the defects in the sidewalk, and that he could have avoided them by walking along the fence, or in the street, or around the square; and that having voluntarily chosen to take the risk of walking on the sidewalk in its defective condition, he was guilty of contributory or concurrent negligence, and cannot recover in this action."

That point was refused for the reason that the assumed facts therein were not the whole truth; otherwise it would have been affirmed. The accident occurred after nine o'clock in the evening, when the plaintiff was going from church on the direct way to his home. The night was dark and the street unlighted. The witnesses agree that the sidewalks on both sides were in bad repair, both unsafe, but there is some conflict of testimony as to which was in the worse condition. There is testimony that the walk along the fence was very unsafe, and as dangerous as the sidewalk; also that by going around the square the plaintiff would have been compelled to run off the sidewalk, and might have run

into several of the other bridges and met with an accident; also that the street was muddy, and had he waded through the mud there would have been danger of falling into chuck-holes, but had he fallen in the mud he might not have been so badly hurt. Several witnesses thought the muddy street was safe for a man to walk, but none testifies that any person did walk on it. And none testifies that it was a safe way for the plaintiff to go around the square. Hence it was for the jury to determine whether the plaintiff could have found a safe walk along the fence, or on the street, or around the square to his home. And they were instructed that if he knew the sidewalk was dangerous "and could, with reasonable care, have avoided it by turning outside on the street, or by taking the other side of the avenue, or the space between the board walk and the fence, or could have with reasonable care taken his way home by some other street or walk, he was guilty of contributory negligence and cannot recover."

But the jury were not instructed that the plaintiff should have taken another unsafe route; in effect they were instructed that if he voluntarily took the direct walk, even if he knew it was unsafe, instead of one indirect and unsafe, and acted with the care with which a prudent man should have acted under the circumstances, he was not guilty of contributory negligence.

Among the circumstances was the well-known bad condition of the streets and walks in that part of the city, which streets and walks were in constant use. Even if the muddy street was safer for pedestrians than the sidewalk, it could not be expected that persons would shun the walk and wade the street. When a city leaves a walk without guard or warning, persons going on foot usually take the walk; persons of ordinary prudence in the exercise of ordinary care, usually travel on the sidewalk, when it is known to be defective, rather than risk the dangers of the street. There had been no sudden or recent injury to the public ways; the residents had become accustomed to their use in their bad condition, and the city officers were indifferent. It is not the law that a resident in a city must remain continuously on his property, when the city grossly neglects the repair of its streets, under pain that if he ventures on the streets or walks and suffers injury resulting from the city's default, he can recover nothing. Nor is the resident bound under like pain to abstain from going to church in the evening, or other places when he may be moved to go by a sense of duty or love of

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pleasure. On his part it is enough if he takes the ordinary care which ought to be exercised by a prudent man under the circumstances. This sidewalk had all along been in use, was generally used by many people, and though unsafe, very few persons had received injury. The rulings of the court below, and what we have said, apply to such walk or street; not to one where a prudent man in the exercise of due care would not travel.

A glance at the facts, as settled by the verdict, shows that this case is not governed by the controlling principle in *City of Erie v. Magill*, 101 Penn. St. 616; s. c., 47 Am. Rep. 739; *Fleming v. Lock Haven*, 15 W. N. O. 216. In each of those cases the accident was in daylight, and a convenient and safe way was known to the injured party who chose not to take it.

Here, with little verbal change, the language of Justice CLARK in *Borough of Easton v. Neff*, 102 Penn. St. 474; s. c., 48 Am. Rep. 213, is fitting: "There was evidence in the cause, some of it inferential in its character, tending to show contributory negligence; this was for the jury. In the use of a public highway, in general, ordinary care is undoubtedly the rule. Negligence is defined however by the absence of care according to the circumstances. In this case the plaintiff was quite familiar with the walk. He had passed over it often. He says he knew it to be a place of danger. The injury was received after night, and the night was dark. Did he exercise a proper measure of care? He was bound to use as much care as a prudent person would use under such circumstances. The measure of duty in the case of a municipal corporation in reference to its streets is but ordinary, and the care of those who use them is the same, whilst the standard of the degree of care is to be measured according to the circumstances."

In view of the testimony, affirmance of the defendant's second and eighth points would have been error. As abstract propositions the third and fourth points might have been affirmed, but with reference to the testimony, the court properly ruled that they depend on the answer to the second point. Under the charge the jury must have found that the street was unsafe to walk on, else the verdict would have been for the defendant. Whether it was daylight or dark the plaintiff was not guilty of negligence in taking the unsafe walk when it could not be avoided by taking a safe one. That it was dark was a fact to be considered. Had it been daylight it is unlikely that the plaintiff would have been injured. He says he thought he had

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passed the dangerous places before he fell. The risk was greater in the night than in the day, but that is no reason why he should have taken an unsafe and dangerous way of which he had less knowledge.

Judgment affirmed.

GORDON and PAXSON, JJ., dissent.

POWELL V. COMMONWEALTH.

(114 Penn. St. 285.)

Constitutional law — oleomargarine.

SUFFICIENTLY reported, 57 Am. Rep. 749.

GALLAGHER'S APPEAL.

(114 Penn. St. 353.)

Partnership — paying firm debts out of individual property.

A partner may pay a debt of his firm out of his individual property, even at the expense of his individual creditors.

APPEAL from distribution of an assigned estate. The opinion states the case.

Jeff W. Taylor and A. D. McConnell, for appellant.

Peoples and McAffe & Atkinson, for appellees.

PAXSON, J. This was an appeal from a decree of the court below distributing the assigned estate of George Gallagher. The deed of assignment appears to have conveyed not only the individual estate of George Gallagher, but also "all the goods, chattels, effects, book accounts, notes and property of every kind, real, personal and mixed, of the partnership heretofore existing between the said George Gallagher and Thomas F. Gallagher, deceased, of which said partnership the said George Gallagher is the surviving partner."

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The assignor had a valuable real estate which it was conceded was his individual property, and the title to which was in his own name. The assignment was executed on the morning of March 17, 1885. On the 16th of March, the day prior to the assignment, and probably in anticipation thereof, the assignor confessed judgment to various firms and individuals, aggregating about \$48,000; about three-fourths in amount of said judgments were for the debts of the firms of T. & G. Gallagher, and George Gallagher & Son, of each of which he had been a member shortly before the assignment. The *bona fides* of these judgments was not disputed. It was conceded that he owed the different firms in whose favor the judgments were confessed; the contention was that he had no right to pay the debts of his firm out of his individual estate in preference to his individual creditors.

Since *Blakey's Appeal*, 7 Penn. St. 449, it has been the settled law of this State that a debtor may prefer a creditor provided he does not do so in a deed of assignment. The act of 1843 strikes down such preferences in assignments. But whilst a man retains dominion of his property he may pay whom he pleases or secure whom he pleases; he may encumber or convey his property; he may prefer creditors as he chooses by payment or transfer. So long as he violates no law and commits no fraud the law will not interfere with him. It is only when a man loses dominion over his property, and transfers that dominion to another, that the right of a creditor to a *pro rata* dividend attaches. When it is *in gremio legis* his control over it ceases.

It is conceded law that one partner may not pay his private debt out of the assets of his firm, and it was contended by the appellants that the converse of this proposition is true; that is to say, that one member of a firm may not pay the debt of his firm out of his individual assets until his private debts are first paid. If the appellants' contention amounts to any thing it amounts to just this. This position is so palpably unsound that it does not require extended discussion. The difference between the two propositions is obvious to the dullest understanding. To pay a private debt out of firm assets is a fraud — an actual fraud. It is taking the money of one person to pay the debt of another, and being an unlawful act may be restrained by an injunction. But who ever heard of restraining by injunction a man from paying his own debts with his own money? which is precisely what a man does when he pays

a debt of his firm out of his private means. Not only will the law not interfere in such case, but it will lend its aid to compel him to do this very thing. For a debt of the firm the creditor may levy upon and sell the private property of one partner.

It is true the rule in equity is settled in this State that when there are partnership and separate creditors, and partnership and separate property, and the firm is insolvent, each class has priority upon its respective estate, and must first resort to it for payment. After satisfaction of the claim of either class, the other may come upon the residue, according to its several legal and equitable rights. *Black's Appeal*, 44 Penn. St. 503. But it is equally well settled that this is the equity of the partners, not of the creditors, and if the latter cannot work it out through the partners they cannot do so at all. It is a rule also that can only be invoked when the law steps in to distribute the estate of the insolvent firm. It has no application to an act done by a partner whilst in the full control of his property.

The appellees claim by virtue of a lien lawfully acquired upon the real estate of the assignor. It is now proposed to postpone those judgments by an equitable mode of marshaling assets. This cannot be done in this State. *Cumming's Appeal*, 25 Penn. St. 268. It was held in that case that a judgment against a firm is a lien on the separate real estate of the partners, and is entitled to priority in the distribution of the proceeds of sale of such separate real estate, over a subsequent judgment of a separate creditor of the partner whose real estate was sold.

Jackson v. Cornell, 1 Sandf. Ch. 348, was cited by appellants as sustaining the position that the assignor could not by confession of judgment, prefer partnership creditors as against his individual estate. We do not regard it as authority upon the point referred to. The question there arose upon the validity of such a preference in the deed of assignment itself, a thing which would be wholly invalid by our law. And that case recognized the principle contended for by the appellees here, for the court said: "Let the partner actually apply his own property as he thinks proper while he administers it himself." That is precisely what the assignor did in the case at bar. Whilst having full dominion over his property he confessed these judgments. To the extent of giving liens on his real estate he applied it to the payment of certain debts. The assignee took the real estate bound by the judgments and

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subject to their lien. It is too plain for argument that the proceeds must be applied to their payment. This disposes of the only point in the case.

The decree is affirmed and the appeal dismissed at the costs of of the appellants.

COMMONWEALTH V. WALLACE.

(114 Penn. St. 405.)

Criminal law — false pretenses — as to financial condition of bank.

A false and fraudulent statement, by the president of a bank, that the bank is perfectly solvent, and that its assets are largely in excess of its debts and liabilities, constitutes false pretenses.

INDICTMENT for false pretenses quashed below. The opinion states the point.

B. A. Wintermitz, S. L. McCracken, district-attorney, *Charles McCandless and Treadwell & Jameson*, for plaintiff in error.

S. W. Dana and Samuel Griffith, for defendant in error.

TRUNKY, J. [Omitting other matters.] The indictment charges that the defendant did pretend "that the assets of said People's Savings Bank were largely in excess of its debts and liabilities, and that said bank was perfectly solvent and able to pay all its debts and liabilities." Was this a pretense within the statute? Persons in the transaction of business understand that a solvent man is able to pay his debts. The phrase respecting the large excess of assets over liabilities, and the statement that the bank was able to pay all its debts, emphasized the representation that it was solvent. It may be that when a man buys goods on credit, or borrows money, by such act he represents himself to the creditor as solvent, but it is not so understood by persons in business. If the debtor says nothing as to his solvency or property, the creditor does not understand that he represents any thing. A note or other obligation for the payment of money, by usage, does not mean a pretense of ability to pay; but the giving of a bank check by usage is a pretense that there is money in the bank subject to the check. Acts may amount to a pretense as well as words.

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In *State v. Tomlin*, 5 Dutch. 13, the pretense by the defendant to the prosecutor was, that a third person was insolvent, largely indebted, possessed of small means, and unable to pay his debts in full. It was held that the pretense was matter of fact, not mere opinion, and the indictment was sustained. The word "insolvent" signified that the third person was unable to pay, but the added phrases gave emphasis to the representation. It may be more difficult to establish to the satisfaction of a jury that a false representation of solvency, without more, was made with fraudulent intent, or that it induced the prosecutor to part with his property, than it would be were such representation accompanied by a detailed false statement of the property and liabilities of the person represented as solvent. This being so, it is not for the court to say that a positive statement of the fact of solvency is only the expression of an opinion.

We are not convinced that the indictment is fatally defective, and therefore are bound to say that the order quashing it is erroneous. *Com. v. Church*, 1 Penn. St. 105.

Judgment reversed and procedendo awarded. Record remitted.

 WAUGH V. BECK.

(114 Penn. St. 423.)

Contract — illegal — loan for gambling.

To invalidate a loan for a gambling transaction, the lender must not only have known the use intended, but must have been implicated as a confederate, though not necessarily for gain.*

ACTION on notes. The opinion shows the point. The plaintiff had judgment below.

S. Griffith & Sons and E. P. Gillespie, for plaintiff in error.

Mason & Mason, for defendant in error.

TRUNKEY, J. In England wagers were not unlawful or unenforceable at common law, and therefore some of the decisions in

* See note, 82 Am. Rep. 122; *Sprague v. Rooney* (83 Mo. 498), 53 Am. Rep. 383.

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that country upon wagering contracts, are inapplicable where such contracts are unlawful.

It has never been held in the highest tribunals of Pennsylvania that a wager is recoverable, and from 1803 the uniform current of authority is to the contrary. Every species of gaming contract, whether of insurance by a valued policy where the insured has no interest, or a bet on the existence of a letter, or the purchase of stocks or other commodities without the intention to deliver or receive them, is reprobated by our law. *Pritchett v. Insurance Co.*, 3 Yates, 458; *Edgdell v. McLaughlin*, 6 Whart. 176; *Brua's Appeal*, 55 Penn. St. 294. In the latter case, THOMPSON, U. J., remarked: "Any thing which induces men to risk their money or property without any other hope of return than to get for nothing any given amount from another is gambling, and demoralizing to the community. All gambling is immoral."

A transaction in stocks by way of margin, settlement of differences, and payment of gain or loss, without intending to deliver the stocks, is a mere wager. *Maxton v. Gheen*, 75 Penn. St. 166. It is a gambling or wagering operation which the law does not sanction and will not carry into effect. And a broker who advances money to pay losses incurred in such operations, cannot recover the amount advanced, nor even his commissions for his services. *Farrira v. Gabell*, 89 Penn. St. 89; *Dickson's Ex'rs v. Thomas*, 97 Penn. St. 278. Where an infant dealt in stocks or margins, through brokers who did not know he was an infant, until the losses amounted to more than \$5,000, which he had paid them, it was held that he dealt with the brokers as principals and could recover back the whole amount he had deposited with them as margins. *Ruchizky v. DeHaven*, 97 Penn. St. 202. A bond given to cover margins in a gambling transaction will not be enforced in favor of an assignee, unless the obligor precluded defense by stating that he had none, to the assignee before his purchase from the obligee. *Griffiths v. Sears*, 112 Penn. St. 523.

Although not prohibited by statute, a wagering or gambling transaction in stocks, grain, oil or other commodities, is unlawful in this State. A gambling agreement, being in violation of the law and in the nature of a public wrong, has no legal effect. The law forbids it on the ground that it is demoralizing to the community. In an issue which involves inquiry whether such wrong was agreed to be committed, and was committed, it is as fitting

to call it a gambling transaction as if it were so declared by statute.

The jury have found that the plaintiff furnished the money, that is, the consideration of the notes for the benefit of the defendant, but knowingly and with the purpose of furthering a gambling transaction. No question has been made as to what commodity was the subject of the transaction, or whether the money was used for the purpose of gambling. It would be well that the record show a finding of what the transaction was, not only that it appear whether it was violation of a statute, or of the common law, but also that it may appear whether the act was a public wrong. If a statute prohibit an act, it is not necessary in order to invalidate a contract to do the act, that the statute should provide a penalty; nor does it follow because the statute imposes a penalty on a particular act, that such act is illegal. Whart. Cont., §§ 363, 364. The issue should be so framed that the verdict will show the character of the transaction or agreement.

As a general rule money loaned for the specific purpose that it shall be used by the borrower to do an act in violation of law, and has been so used, cannot be recovered back by the lender. It is not enough to defeat recovery by the lender that he knew of the borrower's intention to illegally appropriate the loan; he must know that the borrower is purposing the specific illegal use, and must be implicated as a confederate in the transaction. Whart. Cont. 341-343. "Where stock-jobbing is illegal, money lent for the purpose of carrying it on cannot be recovered, supposing it was lent knowingly and with the purpose of furthering the illegal act." Whart. Cont. 458.

Money lent and applied by the borrower for the express purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, cannot be recovered back. It being unlawful for one man to pay, it cannot be lawful for another to furnish him the means of paying. This is said of a case where the means were furnished with a full knowledge of the object to which they were to be applied, and for the express purpose of accomplishing that object. *Cannan v. Bryce*, 3 B. & Ald. 254. That case arose out of the violation of a statute, founded on public policy to prevent stock-jobbing, and it prohibits payment or receipt of money for satisfying or making up any difference under penalty of £100.

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When the plaintiff, whilst engaged with the defendant and others in gaming and playing at cards for money, lent the defendant a sum of money for the purpose of enabling the defendant to engage and continue in the gaming, it was held that the loan was an illegal contract, and that the money could not be recovered. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect. That which the law prohibits, either in terms or by affixing a penalty to it, is unlawful, and it will not promote in one form that which it declares wrong in another. *White v. Buss*, 3 Cush. 448.

The cases of *Cannan v. Bryce* and *White v. Buss* were where the acts were violative of statutes. But the principle is not limited in its application to such. It applies in many cases where the acts are illegal solely on the ground of public policy. A bond given in consideration of the loan of money with which to put a substitute in the Confederate army, cannot be enforced. *Critchlu v. Holloway*, 64 N. C. 526. A note given for money knowingly lent to be applied to the purpose of suppressing a prosecution for a crime is illegal. *Plumer v. Smith*, 5 N. H. 553; s. c., 23 Am. Dec. 478. Whether such offenses are forbidden or punished by statute or not, money advanced for the purpose of furthering their commission, and so used cannot be recovered.

At the argument, the case of *Third Nat. Bank*, 10 Fed. Rep. 243, was cited as favoring the position that the rule that money lent knowingly and for the purpose of furthering an illegal act cannot be recovered, applies to acts contrary to statute law, and not those contrary to the law founded on public policy. That case was upon promissory notes, the plaintiff claiming to be an innocent holder for value. The notes were given for balances on an illegal agreement unenforceable between the original parties; but it was not within the gaming statute of Missouri, which destroys the negotiable character of a note given for a gaming consideration, within the terms of that statute, for it pronounces a gaming contract absolutely void. And it was held that an innocent holder for value could recover. In the opinion it is said that the great weight of authority supports the rule that a broker or agent, employed to buy or sell commodities for the purpose of speculating on the rise and fall of prices merely, and the agent buys in his own name, but on his principal's account, and after losses have occurred in such transactions, he advances money at his principal's request to pay

such losses, or if he pays such losses, and afterward his principal gives him a note therefor, may recover against his principal the advances so made, or the note so executed, notwithstanding the illegal character of the original venture. Whether such be the rule in this State need not be considered. But it is further remarked: "If a broker or factor supply his principal with funds for the express purpose of enabling him to engage in illegal transactions, and if he, the agent, conducts the illegal venture in his own name, it seems clear that he becomes a *particeps criminis*, and the law will not aid him to recover moneys advanced for such purposes, nor will it enforce securities taken therefor." And this makes near approach to the controlling principle and facts, as alleged in the case before us.

Where a man lends money to another for the express purpose of enabling him to commit a specific unlawful act, and such act be afterward committed by means of the aid so received, the lender is a *particeps criminis*.

The instructions of the learned judge of the common pleas were in the main correct, and in accord with the views hereinbefore stated. There was no dispute as to the use which was made of the money. The gist of the controversy was whether the plaintiff confederated with the defendant for its unlawful use. The court referred to the cases of felony and misdemeanor, stating what would make an accomplice in one, and a principal in the other, to enable the jury to understand that there must have been an agreement that the plaintiff would furnish for the defendant's benefit \$500 for the defined purpose of buying oil for the defendant's benefit, and for the further defined purpose that the purchase should be upon margins, in order to defeat the plaintiff's recovery. There was no error in that. The third assignment is not sustained.

The plaintiff's second point was: "That if the jury believe, from the evidence, that the plaintiff loaned the money which formed the consideration of the notes for the benefit of the defendant, and although he knows the money was to be used in buying oil on margins, still the plaintiff can recover." Answer: "Simple knowledge by the lender of money that the borrower was likely to, or was going to use it in gambling might not be enough to prevent a recovery of the money loaned, but if the plaintiff paid this money to Mr. Lamberton, the oil broker, in accordance with an agreement made between himself and Mr. Cornwall, and if he knew

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this money was going to be used on margins, he could not recover. Therefore, so far as this case is concerned, this request is refused."

The general charge concluded as follows: "The burden of proof in this issue is upon the defendant. It is for him to show by the weight of the evidence that Judge Waugh knew that this was being used for the purchase of oil upon margins. You will take all the evidence in the case and conclude whether he did know that fact."

The plaintiff's second point omitted reference to the allegation that he furnished money for the purpose of purchasing oil on margins, although there was evidence from which the jury could find that fact. If they believed all that was assumed in the point, it did not follow that the verdict should be for the plaintiff. It was rightly refused. The jury might find the facts assumed, and also find that the plaintiff gave the money for the purpose of being used to speculate in the rise and fall in the price of oil; that is, to purchase oil upon margins. Then the money having been so used, the verdict should be for the defendant. But the point simply referred to the plaintiff's knowledge of the borrower's purpose. The answer was explicit that if the plaintiff knew of the defendant's intention to purchase oil upon margins he could not recover. And the same thought was expressed in the closing part of the charge. That we think was error. While proper instruction was embodied in the remarks respecting a felony or misdemeanor, it is by no means clear that the jury would not understand that they could infer the purpose from the mere fact of knowledge. The fourth and fifth assignments of error are sustained.

Judgment reversed, and venire facias de novo awarded.

Grogan v. Adams Express Company.

GROGAN V. ADAMS EXPRESS COMPANY.

(114 Penn. St. 553.)

Carrier—express company—presumption of negligence—limitation of liability.

If an express company loses goods in course of transportation, negligence is presumed.

An express company may not limit its liability for loss of goods by its own negligence.*

ACTION for goods lost. The opinion states the facts. The plaintiff had judgment below.

Wm. R. Blair, for plaintiff in error.

T. S. Parker, for defendant in error.

GREEN, J. In the case of *Farnham v. Camden and Amboy R. Co.*, this court decided that a common carrier might, by a special contract, and perhaps by notice, limit his liability for loss or injury to goods carried by him, as to every cause of injury except that arising from negligence. In that case there was a special contract signed by the receiving clerk of the carrier company, expressed in the receipt given to the shipper, limiting the responsibility of the carrier to \$100 for every one hundred pounds freight, the shipper declining to pay for any higher risk. The goods were carried to their destination, unloaded upon the carrier's wharf, and there destroyed by fire. Although the goods were still in the carrier's custody at the time of the loss, it was held that unless it was proved that the fire was the result of the carrier's negligence, there was no liability beyond the amount limited in the receipt given by the carrier. But it was also held that if there had been proof of such negligence the limitation would not have restricted the carrier's liability. Under the particular facts of the case, the common carrier by force of the special contract, became a private carrier, or bailee, whose liability was to be judged by the terms of the contract.

* See *Coward v. Railroad Co.* (16 Lea, 225), 57 Am. Rep. 326; *Boscounts v. Adams Express Co.* (98 Ill. 523), 34 Am. Rep. 191; *Merch. Dispatch & Trans. Co. v. Cornforth* (3 Colo. 280), 25 Am. Rep. 757; *Galt v. Adams Express Co.* (MacArth. & Mack. 124), 48 Am. Rep. 742; *Shriver v. Sioux City, etc., R. Co.* (24 Minn. 506), 31 Am. Rep. 353.

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Not being an insurer therefore as a common carrier, it was held that there was no liability beyond the amount stipulated in the bill of lading, except for negligence, and that the burden of proving the negligence rested upon the shipper. In determining that it was a case of special contract, much stress was laid upon the fact that the bills of lading duly executed and signed by the agents of the defendants, containing the limitation, were delivered to the plaintiffs, accepted by them and remitted to their agent in New York as his authority to receive the goods, and that "these therefore were the terms on which the transporters shipped their goods, and on which they were received to be transported." In determining the question of negligence, it was held that the proof of loss by an accidental fire was a sufficient accounting for the non-delivery of the goods, and that unless the shipper could prove that the fire was the result of negligence there was no liability beyond the limited amount fixed by the contract.

In the case of *American Express Co. v. Sands*, reported also in 55 Penn. St. 140, the doctrine was repeated that common carriers may limit their liability by a special contract, or special acceptance of the goods, and thus become subject to the laws of bailment only, but that there could be no limitation of liability where the loss or injury resulted from the negligence of the company or its servants. The article carried was a saw, and on its arrival at its destination it was cracked eight to ten inches. There was no evidence to show how this injury was sustained, and hence it was held there arose a presumption of negligence which it was the duty of the carrier to rebut, or be held liable for the full value of the saw, notwithstanding the limitation of \$50 liability expressed in the freight receipt given to the shipper. THOMPSON, J., said: "Had they been able to have shown a *prima facie* case of injury, without fault on their part, they would not have been liable beyond the limit fixed, unless the plaintiff could have established negligence against the company as to the manner of the injury; but their silence was reconcilable with nothing but negligence or wilfulness, either of which would be followed by liability to the full extent of the loss." The doctrine of these two cases is precisely alike on the fundamental proposition that liability could be limited by special contract, but not for negligence. In the one case the carrier escaped liability because he accounted for the destruction of the goods in a manner which did not impose liability without express proof of

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negligence. In the other case, the carrier was held liable because he did not account for the injury, and a presumption of negligence arose which he did not rebut.

How is it in the case at bar? We think it must be conceded that by the terms of the express receipt, signed by the company's agent, and delivered to, and accepted by the plaintiffs, the article shipped was valued at \$50, and the company limited its liability to that sum, and this limitation would be a protection against liability beyond that amount, except for negligence. It is a contract almost precisely similar to the one upon which we passed, in the case of *American Express Co. v. Sands*, *supra*, but is stronger than that in favor of the carrier, because it contains an express agreement that the article forwarded was valued at \$50, which the receipt in the *Sands*' case did not. But the express company in the present case failed to account for the non-delivery of the article, and hence a presumption of negligence arose, which they should have rebutted in order to escape liability, but they did not do so. It was error therefore in the learned court below to refuse an affirmance of the plaintiff's first point, which is a mere declaration of the ruling of this court in the *Sands*' case.

In addition however to this, the learned court further charged the jury that the defendant could limit its own liability, even as against its own negligence, and had done so by the receipt given to the plaintiffs when the goods were shipped.

This was done in obedience to a decision of the Supreme Court of the United States in the case of *Hart v. Penn. R. Co.*, 112 U.S. 331. An examination of that case shows that such is the law as declared by that court, and if the decision were of binding authority upon us we would be obliged to follow it. But our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it. Entertaining these views, we reverse the case upon the first, fourth and sixth assignments of error. The fifth is not sustained, because as a general proposition the defendant's third point is undoubtedly true. We say nothing as to the second and third assignments, because as there must be another trial, the questions arising under them may come before us under a different aspect.

Judgment reversed, and a venire de novo awarded.

Pittsburgh, Allegheny and Manchester Passenger Ry. Co. v. McCurdy.

**PITTSBURGH, ALLEGHENY AND MANCHESTER PASSENGER RAILWAY
COMPANY V. MCCURDY.**

(114 Penn. St. 554.)

Libel and slander — opinions as to meaning of words — charge of embezzlement.

It is not competent, in an action of libel, to aid an innuendo by mere opinions of witnesses.

A publication by a passenger railway company that a conductor was discharged for "failing to ring up all fares collected," does not necessarily import a charge of embezzlement.

ACTION of libel. The opinion states the case. The plaintiff had judgment below.

William R. Blair, for plaintiff in error.

W. D. Moore and *F. C. McGirr*, for defendant in error.

CLARK, J. The plaintiff in this case, H. B. McCurdy, was in January, 1885, employed as a conductor on the cars of the Pittsburgh, Allegheny and Manchester Passenger Railway Company; and on the 18th of May, 1885, was discharged from that employment. Subsequently, complaints were made that he still claimed the right to ride on the company's cars, on tickets to which employees only were entitled; whereupon the company posted in the room temporarily used as a waiting-room, a notice containing the alleged libellous matter complained of, in the following form: "H. B. McCurdy has been discharged for failing to ring up all fares collected. Discharged employees are not allowed to ride on employees' tickets. C. P. Sorg, Ass't. Supt."

The declaration is not printed, but according to the statement in the paper books, it contains two counts; the first set forth that the plaintiff was and is a person of good reputation, and was employed by the defendant company as a conductor; that Charles P. Sorg was the assistant superintendent of said company, having authority to hire and discharge employees, and give reason therefor, and was the general agent of the company; that the defendant company used a certain device to register the fares collected by the conductors, to prevent the conductors from appropriating the same to their own use, etc.; that it was the conductor's duty "to ring up"

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all fares collected; that the plaintiff had faithfully performed this duty during his employment, etc., and paid over to said company all fares collected; that he was discharged from the company's service on 13th March, 1885, and yet the defendants, well knowing the premises, etc., and controversy, etc., published a certain false, scandalous, etc., notice as follows, etc., meaning, etc., that the plaintiff was guilty of the crime of embezzlement. The second count contained a somewhat fuller statement of the alleged libelous matter, but substantially the same averments. The innuendo in both counts is that the plaintiff was guilty of embezzlement, but the innuendo, it is plain, can neither enlarge nor change the meaning of the words in their ordinary signification, or as it is expressed and applied in the previous averments of the declaration, and in the colloquium.

The expression, "failing to ring up the fares collected," is, in a manner technical; it is one peculiar to the business in which the parties were engaged; the words taken together in their ordinary signification convey no distinct meaning, they are indeed without explanation, nonsensical and absurd; evidence was admissible therefore to explain their meaning; to show that "to ring up the fares" was by pulling a rope at the side of the car, upon receipt of each fare, to move the index one point on the circular scale of the register, and as the registry of the fare was announced by the stroke of a bell, the operation was known in the business as "ringing up the fare." The words having by such proof become intelligible, they are to be taken in the sense in which they are thus generally understood and applied, unless facts be given in evidence to show that they may have been used in some different particular sense, on the occasion referred to. There is however no averment in the pleadings that the words were used in any other sense than that to which in the business they were ordinarily entitled, nor was there any evidence of any fact to sustain such an averment if it had been made.

Now the company had a clear right to insist upon the full performance of this duty; it was for many reasons perhaps important that it should be faithfully and promptly performed, and the company, apart from any anticipated fraud, might well annex the penalty of a dismissal from service for neglect of this duty. But a failure to perform the duty required might result from mere neglect or inefficiency, or from motives of dishonesty; "failing to

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ring up all the fares collected " therefore does not necessarily imply the fraud or dishonesty of the conductor; it does not import the commission of any crime. Embezzlement is the fraudulent appropriation by one of the money intrusted to his care by another, and even if McCurdy did fail to ring up all the fares collected, *non constat* that he embezzled the money. " Words which do not necessarily import criminality are in pleading rendered actionable only by reference to extrinsic facts, which show them to have been used in an obnoxious sense; thus the word "forsworn" becomes actionable only when shown to have been applied to one who has given testimony under the sanction of a judicial oath; but when the charge is conveyed by the use of a generic term which unequivocally denotes the presence of every fact necessary to constitute the offense, as where one is charged with "perjury," a reference to extrinsic matters in order to fix the meaning is unnecessary. *Dedford v. Miller*, 3 Pen. & Watts, 103. So in *Lukahart v. Byerly*, 53 Penn. St. 418, the defendant was charged in several of the counts in the declaration with having spoken certain defamatory words of and concerning the plaintiff, to-wit, that "Byerly had taken apples or had stolen apples out of Borland's orchard," and this court said that where the words are laid in an equivocal sense, as imputing a trespass or a felony, though proved as laid the verdict cannot be considered as determining the sense in which they were understood, and that the words were not helped by the innuendo of larceny.

Words it is true are not to be construed in *mitiori sensu* ; it is sufficient if, in their plain or popular meaning, they are libellous, but when they do not in themselves convey the meaning imputed to them in the innuendo, or where they are ambiguous or equivocal, there must be not only in the pleadings but also in the proofs, reference to some extrinsic matter, which will show the sense in which it is claimed they were understood. *Stitzell v. Reynolds*, 59 Penn. St. 490.

The plaintiff's default in not ringing up the fares, as we have said, might have resulted from his negligence or inefficiency, or from mere mistake or accident, or from his intentional frauds, and if people will draw from the general statement of his discharge on that ground, a merely possible inference of fraud and embezzlement, which the words themselves in their usual signification did not justify, it is certainly not the defendant's fault.

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It is true the question, as to the sense in which words are used, is generally for the jury, but that question like all others which fall within the cognizance of a jury, is one of fact and must be determined upon proper proof; if words are reasonably capable of two meanings, one of which is actionable and the other innocent, it is for the jury to say in which sense the words were uttered or understood; but the words here employed are not equivocal or ambiguous; apart from the unjustifiable inference which the witnesses have drawn they are not even alleged to be capable of any but one meaning, and there is absolutely no evidence, as against the railway company, that the words were used in any other sense than that which in the business was ordinarily attached to them; the question was therefore for the court to determine whether the words in that sense covered the crime of embezzlement, as charged in the indictment. The alleged remark of Sorg that he "had got rid of one of the damnedest thieves on the road," especially as the verdict was in favor of Sorg, certainly cannot be imputed to the company.

Several witnesses were called who stated what impression they took from the language used in the written notice, but this at the best was only the expression of an opinion, not the statement of a fact, and upon examination of the evidence it will be seen there was no ground for the opinion. There was not even the suggestion of any fact, by the witnesses, that the words were susceptible of any other than the single sense of their ordinary use in the business; they testified to a mere inference, which they drew from the paper, and which it is plain the paper did not warrant. Such testimony was wholly irrelevant and incompetent for the purpose intended. It is not competent in an action of libel, to aid the innuendo by the mere opinion of a witness. "If this could be done," says Mr. Justice THOMPSON in *Rangler v. Hummell*, 1 Wright, 180, "there would be no use for an innuendo; its office would be supplied by the oath of the witness, who would draw the inference from the precedent facts, instead of a jury; this is not permissible."

Judgment reversed.

STERRETT, J., dissented.

TOWNSHIP OF CRESCENT V. ANDERSON,

(114 Penn. St. 642.)

Negligence — contributory — of person riding with driver of private vehicle.

Where by the concurrent negligence of the driver of a private carriage and the supervisors of a highway an injury occurred to a person riding with the driver, the injured person was guilty of contributory negligence if he joined with the driver in running the risk.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

John S. Ferguson, for plaintiff in error.

W. C. Erskine, for defendant in error.

CLARK, J. This action was brought to recover damages for an injury alleged to have been received by Nancy Cordelia Anderson, wife of William Y. Anderson, from a defective highway in the village of Shousetown, in Crescent township.

A small ravine, perhaps four feet deep and fourteen feet wide, crossed Main street in the village named; it was covered by a bridge eighteen feet in width, which was the only travelled portion of the street at that point. On the 17th November, 1884, the plaintiff, Nancy Cordelia Anderson, came to this crossing in a spring wagon; her father, John McKinley, sat on the front seat and was driving; the plaintiff sat on the back seat; she had a child four years old on one arm, another two years old on the other arm, and in some way held a third, an infant five months old at her breast. The seat was fastened by a "spring catch," in such form as to be removable at pleasure. They found the bridge in process of repair; the planks had been lifted and the bridge could not be crossed. There was a space however above the bridge wide enough to admit the wagon and through this space McKinley drove to the other side. As the front wheels ascended the bank from the ravine, McKinley says, "one of the catches sprung out with the jerk into the gully," the seat turned over and Mrs. Anderson and the three children, were precipitated into the ravine; from this fall she received the injury complained of.

On part of the defendant it is contended in the first place, that there is no evidence of negligence on part of the township, and in the second place if there was, and there was evidence also to establish the negligence of the plaintiff contributing to the injury, that in either case the court should have instructed the jury to find in favor of the defendant.

If it were conceded that when the plaintiff and her father came up to the bridge and saw the condition of the crossing, they could have turned and taken another route known to be safe, or if they had been in proper time warned to take that other route, then we would favor the plaintiff's first contention; for it was the duty of the township officers to keep the bridge in proper repair, and it is admitted that it was uncovered for that purpose; if the planks had become unsafe they not only had a right but it was their duty to remove them; if found unfit to be put down again it was their duty to provide others, and to complete the work with reasonable dispatch; and where, as in this case, the repairing of the bridge would seem to be inconsistent with the ordinary one of the highway at that point, they had the authority to turn the public into some other route until the work was done. The planks were taken up and found unfit for further use; others were ordered and the work on the bridge was suspended until they could be supplied. Barriers were erected and the public warned, not only not to cross the bridge, but the ravine above it; a plank was laid on trestles on one side of the bridge, the remaining planks were placed on a pile on the other side, and some broken pieces, the limb and the butt of a tree were interposed as a barrier above the bridge. Boley testifies that he removed these barriers above the bridge in order to effect a passage with his wagon, but this was done a very short time only before the accident, and without the knowledge of any one representing the township. McKinley says that in the ravine there were "some old pieces of stuff as if a person had thrown them in and went across with a wagon — old pieces, block, brush broken off and thrown in to kind of fill it up."

But however this may be, when Mrs. Anderson and her father came up to the bridge, they stopped and she could plainly see that it was temporarily closed to prevent travel over it. It was manifest also that the bridge was the travelled way over the ravine. Country roads are not in all places prepared for travel, for the full width of the highway; a traveller's duty ordinarily is to follow the pre-

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pared track, if that is in good condition; if he knowingly and intentionally chooses to deviate from it, without cause, and suffers an injury in consequence, the township is in general not liable for the damages. But as the track over the bridge was obstructed by the barrier, the plaintiff had the right to deviate from that route and pass around the bridge, if in the exercise of ordinary care and prudence such a passage would appear to be reasonably safe, but she was bound to the exercise of care. She came to the bridge in the day time, about eleven o'clock in the morning, and she could see plainly that the route around the bridge was not prepared for the passage of vehicles; the ravine, its approaches, its depth and width were all fully exposed to view; there was no water in it; there was no latent defect or danger; if it was a dangerous place she could as readily discern the fact as her father or the supervisor, and it was her duty to see what was clearly exposed to her view. Under the noting of *Carlisle v. Brisbane*, 113 Penn. St. 544, s. c., 57 Am. Rep. 483, the negligence of McKinley could not perhaps be imputed to her, but she must be held for her own negligence; the danger which was obvious to him was as obvious to her. She made no request to her father to take any other route, or that she might get out of the wagon; she made no objection to crossing the ravine, she willingly joined McKinley in testing the danger, and she is responsible for the consequences of her own act.

Boley says it was a dangerous place; that in his opinion any body could see it was a dangerous place by looking at it. Now if the passage at this point was openly and obviously dangerous, it was plainly the plaintiff's duty either to go by some other route, or to get down from the wagon and walk over this ravine, conveying her children in her arms, rather than recklessly expose herself and them to a danger which was imminent. She had a right to the use of the highway, but that right was subordinated to the right of the public authorities to make reasonable repairs for the public benefit. She was not justified in braving a known danger, holding the township for the damages. "A person who knows a defect in a highway, and voluntarily undertakes to test it, when it could be avoided, cannot recover against the municipal authorities for losses incurred through such defect." Whart. Neg., § 440; *Forks Township v. King*, 84 Penn. St. 230; *Pittsburg Southern Ry. Co. v. Taylor*, 104 Penn. St. 306.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF THE
DISTRICT OF COLUMBIA.

WHITE V. CRENSHAW.

(5 Mack. 112.)

Will — life estate or fee — intention.

Where there is a devise to one in express terms for life, and then over, without words to indicate the extent of the devise over, *held*, that the latter devise carries a fee.

BILL for specific performance of a contract to purchase land.
The opinion states the point.

Worthington & Heald, for plaintiff.

John B. Larner, for defendants.

JAMES, J. Whether Mrs. Emily Johnson took a fee-simple or only a life estate, under the will of Mrs. Larned, is the only question in this case. That will contains the following devises :

“First. I give, devise and bequeath to my beloved mother, Mrs. Elizabeth H. Newman, the lot and house in which I now live, in the city of Washington, together with my household and kitchen furniture therein at the time of my death, to hold the said house and lot and furniture during her natural life, and after her death I give, devise and bequeath the said house and lot to my beloved sister, Mrs. Emily Johnson. * * * ”

White v. Crenshaw.

"I give and bequeath and devise to my niece, Elizabeth R. Richardson, daughter of my sister Emily, all my property in the city of Baltimore on which there are payable ground rents.

"Item. I give, devise and bequeath to McClintock Young, junior, and Alexander Young, junior, the children of my beloved sister, Susan Bird Young, my house and lot on St. Paul street, between Baltimore and Fayette streets, in the city of Baltimore, to hold the same as tenants in common. If either of my said nephews, McClintock and Alexander, should die before arriving at the age of twenty-one years, this devise shall inure to the benefit of the survivor and his heirs."

In two instances the devise contains no indications that an inheritable estate is given. But in the third instance, where just the same language is used in giving the house in Baltimore to the two Youngs, the testatrix assumed that her words had given such an estate, for she goes on to say that "if either of my said nephews, McClintock or Alexander, should die before arriving at the age of twenty-one years, this devise shall inure to the benefit of the survivor and his heirs."

The ordinary rule is that a devise of land without any indication of the extent of the interest devised, gives only a life estate. The question however is, whether there may be gathered from expressions in other parts of the will, evidence that, in using this language, the testator intended to give a fee-simple. Undoubtedly the English rule is that such indications in other parts of the will affect only the provision to which they directly apply. They are not accepted as going to explain the testator's meaning in the use of phraseology elsewhere.

But the English rule is founded upon reasons which do not exist with us. When the statute of wills was passed, there already existed a policy to keep the estate together and in one hand. Therefore the courts very properly declined to construe wills as taking the inheritance from the heir except upon plain expression of intent in the particular instance. But the policy of our laws of inheritance is subdivision among heirs, so that our courts are not called upon to watch over the inheritance for the same reasons.

We are not at liberty in construing a will, to ignore any thing that suggests the testator's intention to take the inheritance from the heir; on the contrary, we are charged with a duty to observe these indications and to follow them in ascertaining the intention of the testator.

In this case we find that when the testatrix gave a piece of land to two nephews in Baltimore by just the same language, and without the use of the word "heirs," or any equivalent, she assumed that she had given them a fee-simple, and therefore went on to state what should be done in case of the death of either of them before they became twenty-one years of age. We learn in this way what the testatrix supposed and intended to be the effect of a devise of a described piece of property, without using words of inheritance or any particular equivalent for them, and we must be guided by her lexicon and understand her language as she defines it. We infer therefore from this devise that she supposed she had given a fee-simple to Mrs. Emily Johnson by the same language.

Applying that to the language used in the first item, where she gave a life estate in express terms to her mother, and then, at her mother's death, gave the same property to her sister, with no words indicating the estate to be taken, we think that the two illustrations of her meaning furnished by the other devises would alone be sufficient to show that when she gave property without any reservations, she understood herself to be giving the fee-simple.

But in this very item which contains the devise to Mrs. Johnson there is still another indication of her intention to pass a fee-simple. She first gives the property to her mother in express terms for life, thereby indicating that when she intended to give it for life she said so. Does not this indicate that she understood herself to be doing something quite different when she proceeded next to give the same house to her sister? On these two grounds we think it is clear that the testatrix intended to give a fee-simple to Mrs. Johnson.

The decree will be for the specific performance of the contract.

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KILBOURN V. LATTÀ.

(5 Mack. 304.)

Statute of frauds — oral agreement of partners to divide profits from sales of lands — partnership accounting.

An oral agreement of partners to divide the profits of sales of lands is not within the statute of frauds. (See note, p. 879.)

One partner may be compelled to account to his copartners for profits derived from clandestine dealing with third parties in fraud or to the disadvantage of the copartners.*

BILL for account. The opinion states the case.

Wm. E. Mantingly and Enoch Potter, for complainants.

W. D. Davidge and Shellabarger & Wilson, for defendant.

MERRICK, J. The case of *Kilbourn and Olmstead v. Latta* comes to this court in the first instance from the court of equity on a bill filed by Kilbourn and Olmstead against their late copartner, Latta, for the purpose of obtaining an account of the proceeds of certain negotiations conducted within the limits of the partnership as they allege, which have been appropriated by Latta to his own exclusive use upon the theory that they were not subject to the partnership obligations or the terms of the partnership.

The bill in its third paragraph defines specifically the terms of the partnership, under which the suit is brought, in the following words:

“That the interest of the said copartnership (a copartnership of brokers for the purpose of dealing in real estate) in the capital, business and profits of the said copartnership firm of Kilbourn & Latta was as follows, to-wit: the said Hallett Kilbourn, three-eighths; the said James M. Latta, three-eighths, and the said John F. Olmstead, two-eighths thereof; and the losses, if any, were to be borne by the said Kilbourn, Latta & Olmstead in the same proportion; and it was further stipulated by said partnership agreement, by and between the plaintiffs and defendant, that all profits resulting from operations in real estate, by said firm of Kilbourn &

* See note, 39 Am. Rep. 461.

Latta, or by any member thereof, during the existence of said partnership, should belong to said firm, and be entered upon the books of the firm, and paid into the partnership account; and it was further stipulated in said agreement that any information obtained by any member of said firm during the existence of said copartnership, touching real estate, with reference to its sale or purchase, or the consent of the owner of said real estate to sell the same, or the desire of any person to purchase real estate in said district, was to be communicated to said firm of Kilbourn & Latta, for the consideration of the several members, and the action of the firm thereon; and it was expressly agreed in said copartnership agreement that no member of said firm should, during the existence of said copartnership, engage in the business of buying and selling real estate in said district on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the firm, and said firm had declined to take any part therein."

Under that agreement they continued to operate, and during the progress of it and in violation of its explicit terms, Mr. Latta entered into a sub and secret partnership with a man by the name of Stearns for the purpose of buying and selling real estate, the profits of said purchases and sales to be equally divided between Stearns and Latta.

Their operations were conducted very largely, and the whole of them were secreted from the firm, although the firm was made the nominal agent for the purpose of conducting the purchases and sales; and upon the books of the firm the ordinary brokerage commissions of brokers for making purchases and sales were entered and credited to the firm, while the profits which were made by Latta under this sub-agreement with Stearns were not entered there, and the knowledge of them was entirely suppressed from the firm.

These operations resulted in very large profits to these two parties, and it is alleged on the part of the complainant, that those profits amounted to the sum of forty odd thousand dollars. The defendant admits that they were large profits, but the *quantum* he does not set forth specifically. That is a question, as to the *quantum*, for after consideration. There was a very large and very superfluous amount of detail testimony taken in the cause. The real testimony in the case might well have been embraced in ten

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pages of foolscap; but it was spread over 200 or 300 pages, and the time of this court was occupied three or four days in listening to the details of interrogatory and answer upon very immaterial matters.

But the main facts are entirely plain, entirely specific, and distinctly made by the testimony of Olmstead, one of the complainants, in answer to the interrogatories propounded to him on the part of the defendant, in which he states explicitly that the terms of the partnership were the identical terms contained in the third paragraph of bill which I have already read in the hearing of the bar. His testimony is sustained by a great deal of written testimony, by schedules of the operations of the partnership, showing upon the face of all these collateral papers that such, in point of fact, were the terms of the partnership. Independent therefore of other testimony, these portions of testimony which I have enumerated are sufficient, in the eye of a Court of Chancery, to outweigh the denial of the defendant in his answer and to establish the facts relied upon by the complainants in their bill.

Assuming that the facts are established by that sort of testimony, were it admissible, the defendant contends, and that is the chief point of his contention before the court, that no partnership involving any transactions in real estate which would result substantially in an interest, or the fruits of an interest in real estate can be established by parol; but that within the fourth section of the statute of frauds it is necessary that such a partnership should be established by writing, and that otherwise there is no redress for a violation of faith in respect of such transactions.

There is, it is true, a very great conflict of authorities upon the subject. But the court is satisfied that the vast weight of opinion, running parallel with the instincts and requirements of natural justice, is on the side of the maintenance of such partnership by parol proof.

The leading case upon the subject is the case of *Dale v. Hamilton*, 5 Hare, 369, and while that, so far as England is concerned, is to some extent shaken by the case of *Caddick v. Skidmore*, 2 DeG. & J. 51, yet it is recognized in the writers on partnership in England as establishing the doctrine, of whom chiefly may be mentioned Lindley in his latest work on page 89 and the two or three following pages. That case reviews the doctrine and authorities very largely. It very copiously criticises them, and in aid of

that review of the authorities, upon the strongest reasoning upon the policy and objects of the statute of frauds, maintains distinctly that such a partnership need not be avouched by writing within the fourth section of the statute. That authority is thoroughly sanctioned in this country by numerous decisions, among the chief of which may be noted the case of *Chester v. Dickinson*, 54 N. Y. 1; s. c., 13 Am. Rep. 550; and the case in 63 Iowa at page 64.

It is true there are authorities, as I have said, the other way, but the weight of authority and the reason of the law follows the case as first decided by Vice-Chancellor WIGRAM in 5 Hare, where it is held that such a partnership need not be established in writing, but is good independently of it. And that doctrine this court accepts fully, and it would be very slow at any time to accept a technical doctrine for the defeat of the purposes of justice and right between man and man.

Such being therefore the doctrine, and the partnership being established, it was clearly proved (not controverted indeed) that dealings had occurred in this way and that profits had been made; the contention was made on the part of the defendant that if that were so a Court of Chancery was not the proper court to obtain redress for the violation of the agreement, but that the only redress which the party could have was in his action for damages, if any such lay at all, in a court of law for the injury the plaintiff sustained by reason of the violation of the partnership undertaking by the defendant Latta, and his redress therefore was an action founded in damages; and being a parol contract it would be damages in an action of assumpsit and not in an action of covenant, as it would have been in the case of a contract under seal.

But we do not read the law that way. The principles which regulate the action of a Court of Chancery with regard to the abuse of the confidence of partnership, the taking advantage of partnership transactions and making a profit independently and privately out of that which belonged to the partnership and in good faith should go to it, are so distinctly laid down in two or three sections of Story on Partnership that they will be a full vindication of the holding of the court in this particular case. I read first from section 173, where he says:

“One of the most faithful duties and obligations of all the partners is strictly to conform themselves to all the stipulations contained in the partnership articles, and also to keep within the

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bounds and limitation of the rights, powers, authorities and acts belonging and appropriate to the discharge of the partnership, trade or business. . Every known deviation from and every excess in the exercise of such rights, powers, authorities and acts which produce any loss or injury to the partnership to that extent are to be borne by the partner who occasions a loss or injury; he is bound to indemnify the other partners therefor."

Again, in section 174, he says:

"But there are many implied duties and obligations even though they are not expressed (as here they are all expressed) of an equal importance though not perhaps always of so obvious a nature. Thus for example, it is a violation of good faith for any partner, in conducting a partnership business, to stipulate clandestinely with third persons for any profit or benefit to himself exclusively of the partnership, for all the partnership property and partnership contracts should be managed for the equal benefit of all partners according to their respective interests and shares therein. If therefore any one partner should so stipulate clandestinely for any profit, advantage or benefit to himself to the disadvantage or in fraud of his partnership, he will in equity be compelled to divide such gains with them."

Now upon that I might pause here for the purpose of showing that even if it were made to appear upon authority that a contract to buy and sell real estate for partnership profits, and to divide the profits among the partners in any proportions, were subject to the objections arising out of the fourth section of the statute of frauds, yet nevertheless it is very clear that there may be a partnership among brokers for the purpose of dealing in landed estate; that is, as acting agents for other parties to buy and sell on account of other parties. Now suppose that is the sole limitation of the partnership here. The facts show that Latta, within the terms and principles of this section of Story which I have quoted, did violate his partnership obligations by going outside of it and receiving secretly from the man with whom he was dealing, over and above the ordinary brokerage profits, certain profits to himself out of the transactions, which ought to have been partnership transactions, to-wit: half the profits of the speculation of the man for whom he was dealing in the name of the partnership.

Under such circumstances, clearly within the terms and principles of this section, he would be responsible to his copartners for

that share of illicit profit which he had made over and above the proper profit of the partnership which he had taken advantage of them to make in fraud of their rights. That is entirely outside of the objection of the statute of frauds with regard to that phase of the partnership relations which contemplated a purchase and sale by them of real estate in order to their own advantage. So also in section 175 of the same work, it says:

“The same doctrine is applied to other analogous cases. In all purchases and sales made on account of the partnership, every partner is bound to act expressly for the benefit of the partnership. Therefore he has no right and cannot, consistently with his duties, voluntarily place himself in a situation in which his bias, as well as his interest, is in opposition to the interest of the partnership.”

Also in section 177, it is said:

“Upon similar grounds it is the implied obligation and duty of every partner not to engage in any other business (this applies to the phase of it of which I am now speaking) or speculation which must necessarily deprive the partnership of a portion of the skill, industry, diligence or capital which he is bound to employ therein. In other words, he is not at liberty to deal on his own private account in any matter of business which is obviously at variance with or adverse to the business or interests of the partnership.”

Section 178. “And if therefore one partner should clandestinely carry on any other trade or the same trade for his own profit and advantage and in a manner injurious to the true interests of the partnership, or should divert the capital or funds of the partnership to such secret and sinister purposes, he will be compelled in equity to account for all the profits made thereby.”

As I have said, the proof is clear, in either aspect of the case, whether the partnership be proved only to be a partnership of brokerage, or whether it be a partnership extending to the right to deal in real estate and to buy and sell it for their own profit, in either aspect, that this defendant, within the principles laid down here, has violated the partnership obligation, taken advantage of his own skill, diligence, time and knowledge, which it was his bounden duty to dedicate exclusively to the benefit of his partnership, and has reaped this secret advantage from these dealings. The knowledge and skill of the partnership, the state of the real estate market, was their capital in trade, and he was bound to share all the beneficial results which would flow from his knowledge with

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his copartners. He has not done it. He has been guilty of one of those frauds which the terms of the commercial law characterize with the uttermost reprobation, and a court of justice (and this court sitting in chancery whenever such a case shall come before it will not be behind any other court) will administer the full measure of redress.

Therefore the decree will be that the parties account; that the case be remanded to the Circuit Court in order that it may be referred to the auditor to take an account of the profits which he may have made according to the allegations and proofs of this bill, and as to which he is responsible to his copartners for their just proportionate shares, according to the terms set out in the third paragraph of the bill.

NOTE BY THE REPORTER.—An oral agreement to form a copartnership for the purchase of land, including a contract to sell land, is void under the statute of frauds. By the terms of the agreement the defendants were to negotiate for the purchase for the parties, take the title in their names, and pay the purchase-money therefor; the defendants to be owners of two-thirds and the plaintiff one-third of the property, when thus purchased, and the plaintiff to reimburse the defendants for his one-third of the purchase-price in his sawing and converting the timber into lumber for sale. Clearly, we think the agreement sued upon included a contract for the sale of land which was not in writing, and void under the statute of frauds, above given. The contract for the purchase of the land was included in the agreement to engage in the copartnership, and is made the basis thereof, and the failure of the defendants to perform their undertakings relating thereto, as stated in the agreement sued upon, constitutes the plaintiff's sole ground for the damages he claims to have sustained. In *Levy v. Brush*, 45 N. Y. 589 it was held, where an oral agreement was entered into between the plaintiff and defendant, by which the latter agreed to purchase land, and pay therefor from his own funds the necessary amount for that purpose, for the joint benefit of both, the plaintiff to reimburse one-half the money so paid, the deed to be taken in the name of both, the defendant having made the purchase, and taken the contract in his own name, and refused to convey one-half to the plaintiff, that no action would lie to compel the execution of the agreement; that the case was within the statute of frauds, and that the defendant had a perfect right, both at law and in equity to refuse performance. In *Rawdon v. Dodge*, 40 Mich. 697, the agreement was oral that Dodge should cause to be conveyed to Rawdon an interest in land held by one Sayles; and Mr. Justice GRAVES, in delivering the opinion of the court, said: "It is not claimed that written evidence was not necessary to show the agreement for the transfer of the equity of redemption, or that there was any such evidence, and the record imports that no proper writing was ever made. The agreement was that an interest held by Sayles in the land should be conveyed to Rawdon, and the transaction was

within the words and policy of the statute. How. Stat., §§ 6179-6181. The fact that the interest to be transferred was not in Dodge, but was vested in Sayles, could make no difference. It was a contract for the sale of an interest in land, and it is not important that the title then resided in a third person." See also *Wright v. De Groff*, 14 Mich. 163; *Scott v. Bush*, 29 Mich. 523; *Erben v. Lorillard*, 19 N. Y. 299; *Purcell v. Miner*, 4 Wall. 518. Mich. Sup. Ct., June 10, 1886. *Raub v. Smith*. Opinion by CAMPBELL, C. J.

In *Babcock v. Read*, 99 N. Y. 609, an oral agreement to share in profits or losses of a contemplated speculation in real estate was held not within the statute, on the strength of *Traphagen v. Burt* and *Chester v. Dickinson*.

In *Everhart's Appeal*, 106 Penn. St. 349, it was held that where a partnership is formed for the purpose of buying and selling lands, one of the partners cannot establish his interest in such lands by parol evidence, where the other sets up the statute of frauds requiring agreements relating to lands to be in writing. But that rule does not apply to an agreement for a division of profits arising from the sale of lands so purchased by the partnership.

In *Richards v. Grinnell*, 63 Iowa, 44, the court said: "It is not to be denied that there are adjudged cases which hold that such a contract is within the statute of frauds. On the other hand there are many cases which hold that a parol contract of partnership is not within the statute." Citing *Dale v. Hamilton*, *Chester v. Dickinson* and *Holmes v. McCray*. We think the cases above cited are in accord with the decided weight of authority, and in our opinion they are founded upon sound reason and correct principles. It is every where held that where land is held by a partnership, it is, as between the parties, and as to the creditors of the firm, to be treated as personal property. Such being the law, it would seem to follow that the statute of frauds can have no application to land thus held and owned."

This doctrine is recognized in *Rowland v. Booser*, 10 Ala. (N. S.) 690; *Patterson v. Wone*, 10 Ala. 444; *Henderson v. Hudson*, 1 Munf. 510; *Bird v. Morrison*, 12 Wis. 188, 152; *Smith v. Burnham*, 3 Sumn. 435, 459 (STORY, J.); *Levy v. Brush*, 45 N. Y. 589, 595.

The contrary doctrine in *Chester v. Dickinson*, 54 N. Y. 1; s. c., 18 Am. Rep. 550, is *obiter*. It was however adopted in *Traphagen v. Burt*, 67 N. Y. 30, but the decision was put on the ground that the contract was executed. Page 34. The question was evaded in *Williams v. Gillies*, 75 N. Y. 197, 201. The contrary doctrine was held in *Dale v. Hamilton*, 5 Hare, 369, by Vice-Chancellor WIGRAM, who confessed however that it seemed "virtually to repeal the statute of frauds." Page 382.

"It is not a contract for the purchase and sale of land by one to the other, but it is an agreement by which they are to acquire the land jointly." *Gibbons v. Bell*, 45 Tex. 417. And see to the same effect, *Holmes v. McCray*, 51 Ind. 358; s. c., 19 Am. Rep. 735.

Mr. Browne (Stat. Frauds, § 262) adopts the latter view.

See *Snyder v. Wolford*, 33 Minn. 175; s. c., 53 Am. Rep. 23.

See *Treat v. Hiles*, *post*.

Craig v. Warner.

CRAIG V. WARNER.

(5 Mack. 480.)

Will — devise — in tail — contingent remainder — merger.

W. devised to H. B. and her son C., for life, as joint tenants, and if C. should marry and die leaving lawful issue of such marriage, or the lawful descendants of such children, and if such lawful issue, or their lawful children should be in being at the time of the death of the survivor of said H. B. and C., then to such issue and children and their heirs in fee-simple; but if said C. should die without having been married, or without leaving such lawful issue, or the children of such lawful issue surviving him, then to testator's right heirs, who were the said H. B., one of the life-tenants, and her sister S. M. B. *Held*, not a devise in tail to C., but a devise to H. B. and C. for life, with contingent remainder in fee to the immediate children of C., or to the children of such children, according as the one or the other should be in being at the death of the survivor of the life-tenants; and that reversion of the fee descended to H. B. and S. M. B., until the contingency happened. During the contingency H. B.'s moiety by mediate descent vested in C., and S. M. B.'s moiety was conveyed to him by bargain and sale. *Held*, that C.'s life-estate was merged, and the contingent remainder was defeated.

THE case is stated in the opinion.

Morris & Hamilton, for plaintiffs.

James M. Johnston, for defendant.

JAMES, J. In 1841 one John A. Wilson died seised and possessed of certain lands in the city of Washington, and devising the same in the following words:

"I give, bequeath and devise to my sister Mrs. Henrietta Burgess and her son Dr. John E. Craig, as joint tenants during their joint lives and the life of the survivor of them, the lands and premises in which I now reside, called "Cazanova," including all my estate and interest in all the lands now inclosed by me, lying in the city of Washington, between T street north and the northern boundary line of the said city, and between Second and Third streets east, and if the said John E. Craig shall hereafter marry and die, leaving lawful issue of such marriage or marriages, or the lawful descendants of such children, and such lawful issue, or their lawful children, shall be in being at the time of the death of the

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survivor of the said John E. Craig and Henrietta Burgess, then I give, bequeath and devise to such issue and children the said lands and premises to them and their heirs in fee-simple, but if the said John E. Craig shall die without having been married and without leaving such lawful issue or the children of such lawful issue surviving him, then the said lands and premises to go to my right heirs."

The testator left surviving him, as his only heirs-at-law, his two sisters, Susan M. Burche and the said Henrietta Burgess.

Mrs. Burgess died in 1844. In 1847 Dr. Craig, the surviving tenant for life, married, and of that marriage the plaintiffs (excepting the husbands, who are joined in this action) are the lawful issue.

By deed dated September 29, 1848, and recorded June 1, 1850, Mrs. Burche conveyed to Dr. Craig all her interest, either as heir-at-law or devisee under the will of John A. Wilson, in the property in controversy; and by deed of the same date and record Craig conveyed the premises to one McLaughlin, and such right and title as McLaughlin acquired was, by several mesne conveyances, finally vested in the defendant Warner, the present occupant.

John E. Craig died in 1874, leaving surviving him, the immediate issue of his marriage, the plaintiffs in this case, who claim title on the ground that their father had only a life-estate in the premises, and that the remainder vested in them during that estate.

Verdict and judgment were for the plaintiffs, and upon the defendant's motion for a new trial on exceptions to the rulings of the court, the case now stands for hearing in this court.

The effect of these rulings at the trial is, that Dr. Craig took by will an estate for life, with contingent remainder to his unborn children; that the event occurred while the life-estate was in existence, and that thereby an estate in fee-simple vested in such children. The proposition on the part of the defendant, raised by his exceptions are, first, that under the rule in *Shelley's* case, Dr. Craig took an estate-tail by the will; that by the acts of Maryland of 1782, chapter 23, and 1786, chapter 86, this was turned into a fee-simple, and that consequently there could not be any remainder; and second, that if, on the other hand, he took only a life-estate by the will, with contingent remainder, the fee-simple was in Mrs. Burgess and Mrs. Burche, either by way of reversion as heirs-at-law of the testator, or by way of remainder limited to them by the will; that he afterward acquired this fee-simple, in part by descent from his mother, Mrs. Burgess, and in part by Mrs. Burche's deed of

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grant, bargain and sale, while the remainder to his children was still contingent, that the life-estate on which that remainder had depended was thereby merged, and that consequently the remainder became impossible and was defeated, the whole estate being now in Dr. Craig.

It should be observed here that the instructions asked by the defendant, and refused by the court, raised the question of merger separately as to the moieties of the reversion or remainder, derived from Mrs. Burgess and Mrs. Burche respectively; claiming, that is to say, that if Dr. Craig took Mrs. Burgess' interest by descent, the plaintiffs could not recover as to that moiety, and that if he took Mrs. Burche's interest by her deed, they could not recover as to that moiety of the premises.

We proceed to consider first whether Dr. Craig took under the rule in *Shelley's* case, an estate-tail; and for that purpose it is convenient to restate the provisions of the will. In doing so, we shall use terms which we conceive to be equivalents of the testator's actual words, supplying some others whose presence the words actually used by the testator assume, as we think to be understood. Stated in this way, the clause in question would read as follows:

"I devise to my sister Henrietta Burgess, and her son Dr. John E. Craig, as joint tenants, during their lives and the life of the survivor of them, the described lands; and if Craig shall hereafter marry and die, leaving lawful issue of such marriage, or if not leaving such lawful issue, then leaving the lawful descendants of such children, and if such lawful issue, or if not such lawful issue, then if their lawful children shall be in being at the time of the death of the survivor of the said Burgess and Craig, then I devise the premises in fee-simple to such issue and children, according as the one or the other shall be the persons in being at the death of such survivor; but if Craig shall die without having been married, and without leaving either such lawful issue, or the children of such lawful issue, surviving him, then the premises to go to my right heirs."

It will be observed that if Craig should die without having been married, he could not have lawful issue, and that the next words, "and without leaving such lawful issue," are of no effect as they stand. It is imperative that we should give effect to this clause of the contingency if we can do so, and we conceive that for this reason the word "and" must be taken to mean "or." So that

the whole clause relating to default of the intended devisees must read as if expressed as follows: "but if Craig shall die without having been married, or if having been married, he shall die without leaving either such lawful issue, or the children of such lawful issue, surviving him, then the said lands to go to my right heirs."

Was this a devise to Dr. Craig for life, with contingent remainder to his children, or was it, under the operation of the rule in *Shelley's* case, a devise to him of an estate-tail? Of course it could not be claimed, and has not been, that it operates as a devise to him in fee-simple, inasmuch as the words used, if to be treated as words of inheritance at all, restrict the line of inheritance to heirs of the body. The question then is in what sense the words "issue," "children" and "descendants" were used in this will?

A vast number of decisions have discussed the effect of these words, but the very able judgment of ALDERSON, B., in the case of *Lees v. Mosley*, 1 Y. & Coll. 589, contains a very complete summary of the law touching the application of the rule to devises to issue, and is of itself a sufficient reference. After referring to numerous authorities, he observed that in all of them the word "issue" is treated as a word capable of being used in different senses, either as including all descendants, in which case it is of course a word of limitation, was confined to immediate descendants, or some particular class of descendants living at a given time. Probably it will be found most frequently used in the former sense, and it therefore most frequently has the effect of giving an estate-tail to the ancestor. It might even perhaps be conceded that this is *prima facie* its meaning. But the authorities clearly show that whatever be the *prima facie* meaning of the word "issue," it will yield to the intention of the testator, to be collected from the will, and that it requires a less demonstrative context to show such intention than the technical expression "heirs of the body" would do. In short it is well settled that although the intention of the testator as to whether the rule shall apply, is immaterial when the meaning of his phrases is once ascertained, his intention as to the sense in which he uses words is controlling.

It is claimed however on the part of the defendant, that in this case the context only shows that the word "issue" was actually used in its *prima facie* sense. The argument is that it is used as a term convertible with "descendants," and that the latter is a word which describes an entire line. We think that on the contrary the

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context shows that all of these designations must be understood as referring to particular persons, to be ascertained by the event, and that the conception of a line of descent and inheritors is excluded. As we have already indicated in recasting the language of this clause, it is apparent that the testator describes two sets of persons, to one or the other of which the lands should go, according as the one or the other should fill the condition on which they should take. He provides that if the issue of Dr. Craig should be living at the time of the death of the surviving joint tenant for life, then the devise was to such issue so in being; and next that if no such issue should be then in being, but their descendants or children should be then in being, then the devise was to the latter. Such an alternative is applicable only to particular persons, and as "issue," "children" and "descendants" are words of variable meaning, and may mean only particular persons, we hold that by issue of the marriage of Dr. Craig we are to understand immediate issue or children, and that by the descendants or children of such issue — for in this place these terms are used indifferently — the testator equally means to designate particular persons and not a line of inheritors. It is to be observed, that the issue and descendants of whom the testator is speaking came precisely within the test by which Baron ALDERSON distinguishes individuals from all descendants or a line of descendants, and thereby determines whether they are to take by purchase or are only terms of limitation to the ancestor. They must, that is to say, be issue or descendants in being "at a given time." By whatever words described they are designated as persons answering to certain conditions, to the possible and intended exclusion of such issue, children and descendants as should not so answer. This alone is sufficient to show that these words were not used in a sense which would raise upon them, by construction under the rule, in *Shelley's* case, an estate-tail in the first taker. But there is a more conclusive reason why they cannot be understood to have been used in that sense; the devise to the person described as issue is expressly of a fee-simple.

At common law an estate-tail in the ancestor must descend as such to the issue; therefore an express devise to the latter of a fee-simple amounts to an explanation which is conclusive that the deviser has not used the word "issue" in that sense which would make it a term of limitation to the ancestor, whereby they would inherit a smaller estate than the one which he has given them.

Since the word "issue" is of variable meaning, and we are to accept that meaning which the testator chooses, an express devise of a fee-simple forbids us to adopt a meaning which would give the issue an estate with which the actual devise to them is inconsistent. This is clear on principle and is established by authority. In *Loddington v. Kime*, 1 Salk. 224; Raymond, 203, where A. devised land to B. for life, and in case he should have any issue male, then to such issue male and his heirs forever. Upon a question whether this subsequent limitation to the issue male of B. made B. tenant in tail or not, it was held that it did not, but was a contingent remainder to his issue male. In commenting on this case Mr. Fearne (p. 152) says: "Now this was not only a limitation to the issue male instead of heirs, etc., but that limitation was even accompanied by superadded words of limitation in fee grafted on the words 'issue male,' which circumstances carry the case quite out of the rule I am speaking of."

Mr. Tudor, in his notes to Leading Cases on Real Property, 499, expresses the opinion that *Loddington v. Kime* may be considered as overruled by Lord Keeper HENLEY's decision in *King v. Burchall*, 1 Eden, 424. But that does not seem to have been his lordship's own opinion, for he sought to distinguish *Loddington v. Kime*; and Mr. Fearne (p. 163) has shown that *King v. Burchall* was not only to the effect that the will did not intend to give a fee-simple to the issue. Of course it would follow in that case that there was no devise inconsistent with an estate-tail in the ancestor. Undoubtedly there is a considerable line of English cases in which it was held that the word "heirs," superadded to the words "heirs of the body" or "issue," did not prevent the latter from being construed as words limiting an estate-tail; but we think that these cases decided no more than this: that these superadded words, although sufficient if taken alone to give a fee-simple to the issue, meant in connection with the context heirs of like kind with the heirs already mentioned, namely heirs of the body. Of course it would follow in that case that there was no devise to the issue of an estate inconsistent with an estate-tail in the ancestor. But no such construction can be adopted when the testator expressly declares that the devise to the "issue" is of a "fee-simple." Properly, the only question open to consideration in cases of super-added words, is, whether the limitation to issue is actually of a fee-simple, or is to heirs of a like kind with the "issue" or "heirs

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of the body" already mentioned in the will. When the super-added words are used in the latter sense they are merely superfluous. And this seems to be all that is settled by the cases referred to.

But whatever may be said of these cases, this question has, for us, been authoritatively decided in *Daniel v. Whartenby*, 17 Wall. 639, where the superadded words were "heirs and assigns forever." The principle there recognized is, that where it is clear that a fee-simple is devised to the issue, that word will not be understood to have been used in a sense which would give an estate-tail to the ancestor.

It was suggested at the argument, that by the operation of the statute of Maryland of 1786, chapter 45, an estate-tail must descend as a fee-simple, and that therefore a devise that the issue shall take in fee-simple is not an alteration of the estate, which would be raised in the ancestor by the rule in *Shelley's* case. But it must be remembered that we are dealing with a rule of the common law, which is applicable therefore as at common law; and this is a proposition that we should apply the rule where it would not be applicable at common law. Clearly it was not the purpose of this statute to extend its application. It merely determines what shall become of an estate-tail when such an estate is created, and has no effect to determine when it is created.

We hold then that this was a devise of a life-estate with contingent remainder to Dr. Craig's children.

This conclusion brings us to the defendant's alternative proposition, namely, that pending the contingency the fee in reversion descended to Mrs. Burgess and Mrs. Burche; that one moiety thereof descended from Mrs. Burgess to Dr. Craig; that the other moiety was conveyed to him by Mrs. Burche, and that thereby his life-estate was merged and the contingent remainder was defeated. The plaintiffs, on the other hand, claim that the whole of the reversion was devised to Mrs. Burche, by the residuary clause of the will, and that her deed to Dr. Craig did not take effect until after the remainder had vested in the eldest of the plaintiffs, subject to let in the later-born children; and secondly, that, if the reversion was not devised to Mrs. Burche, but descended to Mrs. Burgess and herself as the right heirs, then, as before, Mrs. Burche's deed was too late to affect the remainderman as to her moiety, while Mrs. Burgess' moiety is not shown to have descended

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to Dr. Craig, and even if it did so descend, could not operate in his hands to defeat the contingent remainder by reason of a certain disabling clause of the will. We shall first consider whether the reversion was devised to Mrs. Burche by the residuary clause.

It appears that after making certain specific devises and bequests, the testator provided as follows : "I hereby charge the rest, residue and remainder of my estate, not hereinbefore specifically devised, or hereafter otherwise disposed of, with the payment of my past debts, so that the previous bequests of freedom to Henry Cook and Minna Cook, of my servants, Charles to Susanah, and Jane to Olivia Harrison, and the property hereinbefore devised to my sister, Henrietta Burgess, and Dr. John E. Craig, * * * shall not in any manner be liable therefor or charged therewith until the whole of the rest, residue and remainder of my estate, personal and mixed, shall have been fully exhausted." The residue thus charged was what he then proceeded to give to Mrs. Burche by the following clause : "The rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath, subject to the charges hereinbefore contained, and not otherwise, to my sister, Mrs. Susanah Burche, her heirs, assigns," etc. Now "the property" devised to Mrs. Burgess and to Dr. Craig, by the clause under consideration, was the *corpus* of which the reversion was the estate ; and we must understand that where the corpus was not included in the specific charge the estate in reversion was also not included ; for as to a charge of debts, they are the same thing ; that is to say, a charge cannot be enforced by sale without carrying away both. Then if the reversion was not included in the residue charged, it could not fall within the residue devised by the residuary clause, which included only the property charged.

But there is a further and even more conclusive reason why the residuary clause cannot be construed in this case to include the reversion. The first clause of the will had provided, that if the remainder after Dr. Craig's life-estate should never take effect, the lands should go to the testator's right heirs, who were Mrs. Burgess and Mrs. Burche, and this included the estate in reversion. That the heirs would, notwithstanding this devise, take by the better title of inheritance (4 Kent Com. 506-7) is immaterial ; we are dealing with a question of intention, and this attempt to devise the reversion explains the intention and scope of the residuary

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clause. Mrs. Burche then did not take the reversion by this clause, but did take one moiety thereof by descent.

The next question is whether this moiety passed to Dr. Craig, while the remainder to his children was yet contingent.

Her deed to him was executed on the 21st of October, 1848, but was not recorded until June 21, 1850. It was suggested by the plaintiffs, that for default of recording within six months after execution and delivery, it was rendered void by the statute of Maryland of 1766, chapter 14, section 2; but the effect of recording was governed by the act of Congress of April 20, 1838, 5 Stat. 226, which provided that deeds should be operative, as to subsequent purchaser, from the time of recording. Devises come within its operation. Then it is claimed that it was still recorded too late to affect the remainder, because it appears that according to the course of nature, the oldest of the plaintiffs must then have been *en ventre sa mere*; in other words, in being; and that the remainder had therefore vested in him, subject to let in the after-born children, the other plaintiffs. But the coming into being was not the contingency on which the remainder was to vest. It was limited to such issue as should be in being at the time of the death of the surviving life-tenant; so that the contingency continued down to the death of Dr. Craig in 1874. This deed then was recorded in time to operate against the contingent remaindermen with whatever effect the law might give to such a conveyance.

Next as to Mrs. Burgess' moiety. It is objected on the part of the plaintiffs that both she and Dr. Craig were cut off from claiming any thing in this estate, even in reversion, by the operation of the following clause of the will: "The foregoing bequests and devises to the said Henrietta Burgess and John E. Craig are to be in full of and in lieu of all claims they or either of them have or may have in any manner or form, whether as heirs-at-law or otherwise, upon my estate, or any part thereof, and to be carried into effect only upon the condition of their and each of them releasing all claims and demands as aforesaid."

It is clear that pending the contingent remainder there must be a reversion and that it must go to some person, either by descent or by devise as a remainder; and we find that one of the "foregoing devises" to Mrs. Burgess was, that this very reversion should go to the testator's right heirs, of whom she was one. As a question of mere intention then the testator did not mean, by the dis-

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abling clause referred to, to prevent Mrs. Burgess from taking a moiety of the reversion. Nor do we perceive how he could do so, if he had intended otherwise, except by devising such reversion to some other person. The law would govern the matter and give her the inheritance, notwithstanding any mere negative provision that she should not take as heir. And in the same way the law governs the effect of descent. If it takes place at all such an estate has the capacities always belonging to a reversion, and these were not, either as a matter of intention or of law, diminished when Mrs. Burgess took this reversion.

Next, as to the descent of her moiety to Dr. Craig. The plaintiffs object that it does not appear that she died intestate, or that he was her sole heir; and the defendant claims that intestacy must be presumed in favor of heirs. When a plaintiff in ejectment claims as lineal heir, he has only to prove that the ancestor from whom he derives title was the person last seised, and that he is the heir of such ancestor (2 Greenl. Ev., § 309; Adams Eject. 253, by Tillinghast), leaving the defendant to prove title out of him by devise to a stranger. 2 Greenl., § 331. In *Brandt v. Cuyler*, 10 Johns. 358, which was an action of ejectment by heirs-at-law, it appeared that the lessors had said that their ancestor had made a will; but it was held that they were not bound to produce the will, or to show what devises it contained, and that it was for the defendant to show affirmatively a devise of the premises, if he meant to bar the title of the heirs-at-law. Here it seems even to have been presumed that a will was in favor of the heirs' title. We do not perceive how the position of an heir, on the record, should affect the rule as to proof of his title, and therefore hold that it appears that, to some extent at least, Mrs. Burgess' moiety descended to Dr. Craig. The further objection that he is not shown to have been her sole heir, is well taken. No such proof is set out in any of the bills of exception. The fact however that he took by descent any part of Mrs. Burgess' moiety, of the reversion requires us to consider the application of the doctrine of merger, as well when the life-tenant acquires the reversion by descent as when he acquires it by conveyance. To these questions we now proceed.

The old puzzle as to the whereabouts of the fee when a contingent remainder was created by a common-law conveyance made no trouble when such a limitation occurred in a deed operating under the statute of uses or in a devise. In such cases it was settled that

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the fee was still in the bargainor or devisor, and descended to heirs, until the contingency happened, when it vested in the remaindermen, unless it was prevented from doing so by a premature determination of the life-estate. This might occur by a forfeiture of the life-estate, or by its surrender to the reversioner, or by its merger in the reversion. The problem presented by surrender is very simple; the giving back of an estate of course ends it; but the problem of merger requires some analysis. It is sometimes said to be a surrender in law, but that is a figure and not an explanation. The conception was, that when the reversion came into the hands of the life-tenant, and there was no intervening estate to keep them apart, the reversion, which before had been only an incorporeal hereditament, was new, by coming to one in possession, itself an estate in possession; and inasmuch as this possession as of a fee, included the whole time and quantity of the life-estate, and was in legal conception, possession of every thing of which estate was capable, the life estate simply had no function nor any part to play. It could only be regarded therefore as having no actuality, and accordingly was held to be quite gone; or in the language of the old lawyers, who were fond of figurative expressions, it was drowned out.

But this conception supposed perfect and complete possession, while the life-tenant may have either perfect or imperfect possession of the reversion; and whether he has the one or the other depends upon the manner and circumstances in which it comes to him. If it is acquired by descent there is a distinction between cases of immediate and mediate descent from the testator, as to the operation of the reversion to merge the particular estate and defeat the contingent remainder. Mr. Fearne (Cont. Rem. 341) remarking that the decisions on this point were apparently conflicting, has classified them and drawn from them the following generalization: "These seeming differences of opinion, I apprehend, may be reconciled by a distinction between those cases where the descent of the inheritance is immediate from the person by whose will the particular estate and the contingent remainder were limited, and the cases where these estates were not created by the will of the ancestor from the inheritance immediately descends on the particular estate." In the first class he includes *Archer's case*, 1 Rep. 66; *Plunkett v. Holmes*, T. Raym. 28, and *Boothby v. Vernon*, 9 Mod. 127; and in the second, *Kent v. Harpool*, 1 Vent. 306; T. Jones, 76, and *Hooker v. Hooker*, cases temp. Hardwicke, 13.

If Mrs. Burgess had been the survivor, both the life-estate and reversion would have been derived immediately from the testator, and according to this distinction, the former would not in her hands be merged; but Dr. Craig, as survivor, derived the life-estate from the testator, and afterward, by a second step in the descent, derived the reversion from Mrs. Burgess, and according to the same distinction, the remainder could in his hands merge the particular estate and defeat the contingent remainder. The reasons for these conclusions need further explanation. In cases of immediate descent, as Mr. Fearn points out (p. 343), the life-estate and the reversion pass from the testator to the life-tenant at that same instant of time, the one by his act, the other by his assent. Now if merger should take place at all, it must operate at the same instant, and the consequence would be that the life-estate would never begin. Thus the will would be void *ab initio*, and it would be out of the power of a testator to devise a life-estate to his heir unless he should add a further vested limitation. It is therefore held that the inheritance descends to such heir only until the contingency happens, and that his possession is imperfect and does not merge the particular estate. And it is to be observed that this is not by judicial legislation, reaching after a reasonable result; it is required by the statute of wills. The legislature itself, by that act, abolished so much of the common law as stood in the way of a disposition of lands by will, and of course excluded, *pari ratione*, any application of the still remaining common-law rule of merger which would have the effect of nullifying the devising power by making a will inoperative *ab initio*. The result is necessarily the very doctrine which has been settled in the cases of immediate descent. The reversion descends to the life-tenant as heir, but shall not unite with his life-estate so as to make the will no will.

But this is an exception to the ordinary and essential principle that the two estates shall constitute but one when one of them adds nothing to the other (4 Kent, 253-4), and as this exception is required only in order that a will may be a will, there is no reason, as Mr. Fearn points out, why it should be applied to a descent which happens after the will has been made effective, and when the estates differ in no respect from such estates vesting in the same person in any other way; or to use Mr. Fearn's words, "when the particular estate has once taken effect, there is no more reason why it, the life-estate, should be exempt from those accidental

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modes of destruction to which the law subjects estates of the same nature in general than there is in any other cases where the particular estate is merged and the contingent remainder is destroyed by the accession of the inheritance."

Sergeant Williams in a note to *Purefoy v. Rogers*, 2 Saund. 382, pretty plainly disapproves of Fearn's solution of the cases from which he draws this distinction, but it is recognized by later writers and by the courts. Mayhew Merger, 69; Preston Merger, 492; 4 Kent Com. 253; 1 Washburn Real Prop. 155, and in *Crumb v. Norwood*, 7 Taunt. 362, it was taken for granted.

If however there had been any doubt about the effect of this mediate descent to Dr. Craig, his own subsequent conveyance of all his estate to Loughlin clearly united the life-estate and reversion in the hands of the latter so as to work a merger of the life-estate; that is to say, to the extent of the coincidence of that estate and such part of Mrs. Burgess' moiety of the reversion as Dr. Craig inherited. In *Egerton v. Massey*, 3 C. B. (N. S.) 338, there was a devise of life-estate to one who was heir, with contingent remainders, and on failure of these to take effect, remainder to life-tenant; the latter conveyed by lease and release; and it was held that the two estates were united in the releasee, and the particular estate was merged, so that the contingent remainder was defeated. And in this country the same principle was applied in the comparatively late case (1835) in *Bennett v. Morris*, 5 Rawle, 8. There the devise was construed to be of a life-estate to one who was heir, with contingent remainder for life. Pending the contingency, the life-tenant conveyed in fee-simple by bargain and sale, and it was held that the life-estate and the reversion were thus united so as to make one entire estate in the hands of the vendee, incapable of being separated to let in the contingent remainder.

As it was urged at the argument that the doctrine of merger is not favored and will not be enforced, when by its application the evident intention of the testator will be defeated, it is proper to remark that it was not originally founded, in cases of devise, upon the particular intention of the testator, and that it has been applied in many cases, as Mayhew observes, in plain disregard of such intention. Even the exceptional rule in cases of immediate descent of the reversion has no reference to any ultimate intention of the testator that the contingent remainder shall not be defeated.

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It only saves the will from being made no will; after that it leaves the estates which it provides to the common accidents of all estates, whatever may have been the expectation of the testator. On this subject Judge KENNEDY said, in the case last referred to: "I do not consider it a sufficient objection that the intention of the testator, as regards the contingent remainder, may be thus indirectly frustrated, because it must be presumed that he was acquainted with the law on this subject, as he was bound to know it; and that unless he introduced trustees into his will for the purpose of preserving the contingent remainder, he left it in the power of the devisee of the particular estate to defeat the contingent remainder by destroying the particular estate." 5 Rawle; 14, 15. If the particular intention of the testator were the test of the applicability of this rule, we would hardly find a solution of the difficulty in a presumption that he knew the law of merger or forfeiture, or that there was such a thing as reversion. It can only be said that merger is a rule of real property which he cannot control when it applies, though he can meet it by making further limitations which prevent its application. Its existence as a part of the law of real estate in this country has been recognized even in the cases where it was held not to be applicable. *Crisfield v. Storr*, 36 Md. 141. Clearly we have no authority to reject it or to modify it; and the very fact, to which our attention has been called, that in England and in some of our States contingent remainders have been protected against this doctrine by statute, only suggests that the proper remedy is in the hands of the legislature, not of the courts.

We have only discussed this question in reference to that part of the reversion which descends from Mrs. Burgess. As to Mrs. Burche's moiety, it is clear that her deed of grant, bargain and sale was effectual to pass her interest to Dr. Craig, and the authorities to which we have already referred show that it had the effect to unite in his hands the life-estate and her moiety of the reversion in such manner as to make an entire estate in fee, incapable of being separated to let in the contingent remainder, and that consequently the latter was to that extent destroyed. Then again Dr. Craig's deed to Loughlin, to which we have referred, included this interest also, and this alone would have been sufficient to unite Mrs. Burche's moiety and the life-estate as one entire fee in the hands of the vendee.

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It was objected by the plaintiffs that Mrs. Burche's deed was ineffectual to bar the remainder, because it was only a bargain and sale and not a feoffment; and on this point we were referred to *Dennett v. Dennett*, 40 N. H. 198. The same objection, we presume, was intended to apply to Dr. Craig's deed to Loughlin. But that rule is wholly inapplicable to such a transaction. When a life-tenant, having only his particular estate, conveys in fee simple, the question is, whether he has forfeited his life-estate and thereby destroyed the dependent remainder; and such forfeiture takes place only when he makes a tortious conveyance which disseises the reversion. Of course, conveyances under the statute of uses have no such effect, and for that reason do not forfeit the life-estate nor destroy the contingent remainder. It does not follow that they are ineffectual to work merger, for forfeiture and merger are very different things. In order to work the latter, it is enough that the two estates should come together; and there is no question of the sufficiency of a deed of bargain and sale to convey the reversion to the tenant, or to convey both the life-estate and the reversion to a vendee. The passage in *Fearne* (Cont. Rem. 322) which is referred to as authority requiring a feoffment, has no reference to the cases just stated. He is there speaking of a conveyance of the life-estate alone, and such a conveyance can affect the remainder only on the principle of forfeiture of the life-estate. In a note to that passage, Mr. Butler has pointed out the distinction between this and a conveyance of the particular estate and the reversion together. See also *Purefoy v. Rogers*, 2 Saund. 386.

Our conclusion then is, that to the extent of the coincidence of Dr. Craig's life-estate with the reversion inherited and purchased by him, the former was merged and the contingent remainder was defeated; for it is well settled that merger may operate *pro tanto*. 1 Just. 182, b.; *Wiscott's case*, 2 Rep. 61, a.; *Mayhew Merger*, 70, 71; *Crumph v. Norwood*, 7 Taunt. 362 (370).

Instructions to this effect were asked and refused at the trial, and the jury were substantially instructed that the plaintiffs were entitled to recover the whole of the premises. We are of opinion that this was error. Judgment is therefore reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

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BRIGHT V. PATTON.

(5 Mack 534)

False imprisonment — arrest without warrant.

An officer has no right to arrest without a warrant, after an offense has been committed, where the punishment is only fine and imprisonment in jail

ACTION for false imprisonment. The opinion states the case. The plaintiff had judgment below.

W. A. Cock and C. C. Cole, for plaintiff.

Birney & Birney and H. E. Davis, for defendant.

JAMES, J. This is an action for false imprisonment. At the time of the alleged wrong the plaintiff was a student at Howard University, in this district, of which the defendant Patton was president. The defendant Hunt was employed there as matron, and the defendant Rhodes was a police officer.

It appears that the plaintiff, upon suspicion and private accusation that she had stolen \$15 from a fellow student, was arrested, without process of warrant, by the defendant Rhodes, at the University, taken by him to his own residence, where she was searched by his wife and daughter, and thence taken by him, still without warrant, to the police station, and there locked up for seven hours, and finally was discharged from custody without further prosecution. The declaration alleges that the defendants Patton and Hunt, as well as the defendant Rhodes, arrested the plaintiff, and that without probable cause and without any lawful warrant.

The defendants Patton and Hunt, jointly, and the defendant Rhodes, separately, pleaded not guilty. The verdict and judgment was against all of the defendants for the sum of \$500 and costs; and the appeal to this court is upon exceptions to the rulings at the trial.

[Omitting minor questions.]

We now come to a very important question presented in the third bill of exceptions. The defendant Rhodes, by his attorney, requested the court to grant the following instructions:

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"1. If the jury find from the evidence that at the time of making the arrest complained of the defendant Rhodes had reasonable ground to believe that plaintiff was guilty of the offense with which she was charged, such arrest was justifiable, and the said defendant is not liable in this action.

"2. In determining whether the defendant Rhodes had reasonable ground for making the arrest complained of by the plaintiff, the jury is to consider only the facts as they appeared to the said defendant at the time of making such arrest, and not as they may have subsequently developed."

The court refused to grant either of these instructions as asked, but after exceptions taken, granted the second one with this modification:

"In determining whether the defendant Rhodes had reasonable ground for making the arrest complained of by the plaintiff, the jury, in considering the question of damages, is to consider only the facts as they appeared to the said defendant at the time of making such arrest and not as they may subsequently be developed."

To the granting of this instruction as modified the said defendant excepted.

These exceptions raise the question, when is an officer protected in making an arrest without a warrant? The common-law rule as to arrest without warrant is stated by SAVAGE, C. J., in *Holley v. Miz*, 3 Wend. 353; s. c., 20 Am. Dec. 702: "If a felony has in fact been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon suspicion by a private individual such individual is excused if a felony was in fact committed and there was reasonable ground to suspect the person arrested. But if no felony was committed by any one, and a private individual arrest without a warrant, such arrest is illegal, though an officer would be justified if he acted upon information from another which he had reason to rely on."

And in the case of *Barrett v. Heider*, in this court (unreported), Mr. Justice OLIN, speaking for the court, said: "Neither a private person nor an officer can arrest a person charged with a crime of less degree than a felony without a warrant, if not committed in their presence. An officer has no right to arrest a person without warrant, guilty of a misdemeanor, after the offense has been com-

mitted." Citing *People v. Adler*, 3 Parker, 249; 2 Hawk. P. C. 121, and 2 Carr & P. 585.

It is urged that this rule of the common law is to be applied according as crimes are graded by the common law as felonies or misdemeanors, and that as petit larceny, the crime of which the plaintiff was accused, is at common law a felony the officer was justified in making the arrest without warrant.

Precisely what distinguishes felony from misdemeanor has been the subject of discussion even among English writers and is the subject of no little embarrassment under our own legislation. We are of opinion however that it is not difficult to determine the principle upon which it was held justifiable to arrest a person accused of one of these classes of offenses without waiting to observe the ordinary formalities of process, while it was necessary to wait and to observe these formalities in other cases. Unquestionably the distinction was made, not in view of the infamy or character of the offense, but in view of the punishment to which the accused person would be liable if convicted:

Inasmuch as an accused person must be deemed to be innocent until found guilty, it would be absurd to found summary treatment upon the mere nature of the alleged offense, for this would involve a subtle implication of guilt, an assumption that he deserved no better treatment. The ground was simply that a person accused of an offense to which terrible punishment was attached would, whether innocent or guilty, be likely, almost certain, to fly and avoid arrest and thus defeat judicial inquiry. The test question is: Why not wait and procure a warrant before you make the arrest? The answer is, because the punishment for this alleged offense is such that by that time, the accused will have fled and escaped. There never was any other excuse for omitting the ordinary sanctions and guaranties of regular proceeding.

Now while this is the ground, and seemed to be conceded at the argument to be the ground, of the rule as to arrests without warrant, it is urged that this rule should be applied according as an offense is defined to be a felony or a misdemeanor at common law, notwithstanding these offenses are not distinguished by the punishment in the same manner as at common law. In effect it is argued that an accusation of petty larceny should be treated as an accusation of felony as if there loomed behind it all the terms of the common-law punishment of felony, notwithstanding that any per-

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son convicted of that offense may be punished by a mere fine or by imprisonment in the jail of the district for a period not exceeding six months, or by both, at the discretion of the court. When the reasons for swiftness, which once accompanied an accusation of the so-called felony, have been removed by the legislature, when the conclusive probability of flight during the short delay for procuring a warrant upon the sanction of a sworn charge no longer exists, it would seem that the old distinction of common-law felony and common-law misdemeanor had ceased to be a sensible rule for determining whether an arrest should be summary or solemn.

Without any other authority than the reason of the common rule itself, we should refuse to employ the mere formula of that rule, since it could not serve here its original purpose. On the very principle of that rule we should now classify accusations which do and accusations which do not justify arrest without warrant according to the punishments which await conviction, and not according to the descriptions by which crimes were known to the common law. But we are not without other authority for placing the rule of arrest on this ground.

The fifth amendment of the Constitution declares that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury." What crimes are to be classified as capital or infamous in the sense of this clause has been considered by the Supreme Court of the United States in the two recent cases of *Ex parte Wilson*, 114 U. S. 417; and *Mackin v. U. S.*, 117 U. S. 348. And those decisions are to the effect that they do not constitute a first class of crimes; that is to say, crimes known as capital or infamous by the common law at the time of the adoption of the Constitution, but such crimes as Congress, when it should come to establish crimes against the United States, should make capital or infamous by the punishments attached to them. Now we have here, in the Constitution itself, a regulation of one branch of the very subject we are considering, namely, the treatment to which a person accused of crime shall be entitled; and the principle declared is, that in reference to the most important aspect of that question, crimes shall be classified, not according to any common-law distinction, but according to the punishments which our own legislature may from time to time attach to them. In applying this distinction the Supreme Court held that imprisonment in a penitentiary, with or without hard

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labor, is an infamous punishment. *Mackin v. U. S.*, 117 U. S. 352.

Now it is to be observed that at common law misdemeanors might be prosecuted upon an information filed at the mere discretion of the proper law officer of the government *ex officio*, although they were ordinarily prosecuted upon indictments found by a grand jury; but under this clause of the Constitution, as construed by the Supreme Court, if a crime, which was a misdemeanor at common law, be punishable by imprisonment in a penitentiary (as certain offenses expressly defined to be misdemeanors are punishable under statutes of the United States), it can be prosecuted only upon a presentment or indictment of a grand jury. It follows equally that if what was a felony at common law should be made punishable only by fine, this clause would not require that it should be prosecuted upon indictment.

As to the treatment of accused persons then, in respect of the manner of prosecution, our fundamental law has put aside the test of misdemeanor and felony, and has established the principle that we are to look only to the punishments provided by our statute. We are of opinion that this principle is of local application. While different considerations are presented by the matter of arrest and the matter of prosecution, we are of opinion that this provision indicates that crimes against the United States are to be classified according to the punishments established by our own legislature, and that we are to be guided by this test wherever it can serve the purpose in hand.

We hold then that the Circuit Court properly refused the instruction asked on the part of the defendant Rhodes, and was right in giving the following instruction as prayed by the plaintiff: "If the jury believe from the evidence that the defendant Rhodes arrested, searched and imprisoned the plaintiff without any written complaint under oath, and without any warrant therefor, then she is entitled to recover against him in this return."

And we are of opinion that an officer has no right to arrest without a warrant, after the offense has been committed, in any case where the punishment attached to that offense is only a fine or imprisonment in the jail of the district, or both.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

HODGES V. POWELL.

(86 N. C. 64.)

Marriage—estoppel of married woman.

Where a wife joined with her husband in a bond to convey land, and after her husband's death received payment and invested the money in other land, she is estopped from claiming dower on the ground that she was not privily examined.*

PETITION for dower. The opinion states the case. The defendant had judgment below.

John F. Hoke, for plaintiff.

DAVIS, J. The law favors dower, and is careful to protect the rights of married women and widows.

We take it to be well-settled that a married woman, being under disabilities to contract, cannot be estopped by any thing in the nature of a contract, but where she does any thing in a matter affecting her rights, upon which a person dealing with her might reasonably rely, and upon which he did rely, she cannot protect herself by the disability of coverture, and claim all the benefits of the transaction, and repudiate all that is against her, while withholding and enjoying the fruits and benefits of her misguiding and repudiated act.

* See *Reando v. Misplay, ante*.

It would be to make her coverture a safe retreat and safe protection for fraud.

The plaintiff joined her then husband, Hawkins, in the execution of the bond to the defendant for title to the land, to be made upon the payment of the purchase-money, but her privy examination was not taken, and she was not estopped from claiming dower. The defendant executed to the husband notes for the purchase-money. These notes were delivered to the wife and claimed by her after the death of the husband as her property. The defendant was not obliged to pay them unless he could get a good title to the land. He was in possession of the land, and she held the notes. It is manifest from the evidence, that he would not have paid the notes to her, or to any one by her direction or with her consent, if he had supposed that she would thereafter set up any claim to the land, and we are at a loss to see how, consistent with any idea of right, she could have received the money, if at the same time she intended to claim the land. It appears that the money was paid by her consent, and some of it by her direction, to Joseph Hodges, her present husband, and the whole of it was invested in the purchase of the home and land on which she and her husband now reside, and the title to which, according to the evidence of the husband (the only evidence upon that point to be found in the record), is in her, though from the verdict it appears to be in the husband. Can she, while enjoying the benefits of a home, paid for by the money of the defendant, be heard to say, because she was a married woman when she joined her now deceased husband in the obligation to make title: "I will hold my interest in my deceased husband's land, because a beneficent law says I am not bound by any obligation entered into under coverture, and I will enjoy, with my living husband, the home and land purchased with money derived from my repudiated act, because though not bound myself, the same beneficent law says it was the defendant's folly to deal with me?" This the law will not tolerate. *Burns v. McGregor*, 90 N. C. 222, and cases there cited; *Towles v. Fisher*, 77 N. C. 443; *Boyd v. Turpin*, 94 N. C. 137.

An infant is not bound by his contract, but if he makes a contract and disaffirms it, he cannot retain any property acquired by virtue of the contract, and the same principle applies to a married woman. The counsel for the plaintiff relies on *Scott v. Battle*, 85 N. C. 184; s. c., 39 Am. Rep. 694. That case is unlike this. There

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the married woman had executed a deed by herself alone, and it was the folly of the purchaser to take such a deed, but in that case RUFFIN, J., said: "If a *feme covert* should retain and have actually in hand the money paid her as the consideration for her imperfect and disaffirmed contract, her vendee would be permitted to recover the same at law, or if she had converted it into other property so as to be traceable, he might pursue it in its new shape, by a proceeding *in rem*, and subject it to the satisfaction of his demand."

That is just the case here. The plaintiff has her election. If the obligation is repudiated and disaffirmed, she cannot retain the consideration without compensating the defendant for his damages."

We are also referred by counsel to *Clayton v. Rose*, 87 N. C. 106. An examination will show that it is unlike this. In that case the act and the silence of the wife constituted no estoppel. She was under the presumed marital influence of her husband, and there was no consideration, benefit or advantage accruing from the transaction to her.

The form of the judgment is objected to here. This is not assigned as error in the record, and it does not appear from the record that this objection was made when the judgment was rendered, or that the attention of the judge was called to it in the court below.

If the plaintiff shall elect to claim dower, the defendant will have a right to such damages as he may sustain thereby, and the judgment can be modified and such order made in regard to the money as will secure and protect the rights of the parties.

There is no error. Let this opinion be certified to the end that further action may be had in conformity therewith.

No error.

Judgment affirmed.

BLACKWELL DURHAM TOBACCO CO. v. McELWEE.

(98 N. C. 71.)

Evidence — statement — in presence of party — estoppel.

Where a witness was examined in a suit in which the defendant in the present action was a party and also a witness, and on such examination made statements in the presence of the defendant derogatory to his rights in this action, which were not then denied, or contradicted on the defendant's examination in that action, *held*, that the defendant was not estopped by such statements, and they were not evidence in this action. *

ACTION to establish the plaintiff's right to a trade-mark, and to recover damages for its invasion. The opinion states the point. The plaintiff had judgment below.

W. W. Fuller and John W. Graham, Thos. C. Fuller, Geo. H. Snow, Thos. Ruffin and A. W. Graham, plaintiff.

John Devereux, Jr., and Jos. B. Batchelor, for defendant.

SMITH, C. J. The only exception we propose to consider, since this is decisive of the appeal, is the admission of certain testimony against the defendant's objection, assigned as error, and embraced in his third exception. This exception is thus set out, with the matter to which it applies, in the record:

"When defendant was on the stand as a witness in his own behalf, plaintiff's counsel showed him a letter signed by Thomas A. Burke, and addressed to Norwood & Webb, attorneys for the executor of John R. Green, and asked him (defendant) if at the time said letter bore date said Burke was not his partner for the manufacture of tobacco. Defendant said he was not, but had been two years before that time. Defendant then answered to questions of plaintiff's counsel, that he had heard said Burke examined in a former suit concerning the rights of plaintiff, assignor and defendant, to the trade-mark now at issue, before a commissioner to take depositions, and that on said examination Burke admitted the statement of said letter to be substantially true; that he (defendant) was present when Burke made this statement, and was himself afterward examined as a witness in his own behalf

* See note, 57 Am. Rep. 429,

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in the same case, and did not refer to or contradict this letter or statement of Burke. Plaintiff contended that the evidence was competent, on the ground that it called for a reply on the part of defendant, and he made none when he had opportunity to do so. Defendant objected to the introduction of the letter of Burke, but his honor admitted it on the ground stated by the plaintiff, and defendant excepted.

The letter referred to is quite long, and purports to have been written at Statesville, in December, 1869. It acknowledges a letter inclosing an account against McElwee & Burke, and admits it to be correct as far as it goes. It also states, that "about the last of November, 1868, myself and McElwee agreed to go into the manufacture of smoking tobacco," and recounts their visit to the late J. R. Green to seek information about the proposed business. After speaking of transactions with him, of which he complains, near the close of the letter he adds: "This is my own individual business. Mr. McElwee had nothing to do with the tobacco trade between me and Mr. Green. He was my partner in the manufacture of smoking tobacco, and I was to give Mr. Green credit for what he furnished me."

This letter was read in evidence and received as a declaration made in the presence and hearing of the defendant, and which if true, it behooved him to deny and disavow in his own deposition. It goes before the jury as a tacit admission of the partnership, the force of which was to be considered by them. In this aspect, it might have great influence in determining the verdict, and if incompetent for such purpose, its reception is an error entering into the trial and vitiating the result.

Was the defendant, under the circumstances, called on in his own examination, to contradict the statement, and is his silence evidence of his assent to its correctness? The general rule is well understood and acted on, that statements made in the presence of a party, and allowed to go undenied and unexplained, are in the nature of an admission of their truth, and as such are competent evidence against him; but in the language of DUNCAN, C. J., in *Moore v. Smith*, 14 Serg. 393, repeated by Mr. Greenleaf in his excellent treatise on the Law of Evidence, vol. I, § 199: "nothing can be more dangerous than this kind of evidence. It should always be received with caution, and never ought to be received at all, unless the evidence is of direct declarations of that kind which

naturally calls for contradiction; some assertion made to the party with respect to his right, which by his silence he acquiesces in."

"The silence of a party," remarks BYNUM, J., in *Francis v. Edwards*, 77 N. C. 274, "is not an assent to statements made in his presence, unless the statements are made under such circumstances as properly call for a response."

The principle is thus stated with care and accuracy in a late case by Mr. Justice ASHE: "To make the statements of others evidence against one, on the ground of his implied admission of their truth by silent acquiescence, they must be made on an occasion when a reply from him might be properly expected. But when the occasion is such that a person is not called on, or expected to speak, no statement made in his presence can be used against him on the ground of his presumed assent from his silence." *Guy v. Manuel*, 89 N. C. 86. He cites also *State v. Sugg*, decided at same term, and *Taylor Ev.*, § 738.

Is the evidence admitted of what is contained in the deposition of Burke given in another suit, where the testimony of the defendant was also similarly taken, and in reference to his letter, within the restrictions of the rule? Was he called on to contradict the statement, if untrue, under the circumstances, verbally or in his own deposition?

In our opinion, it would have been rude and indecorous in him to do so orally; nor was it to be expected that he should interfere with the course of his examination as a witness, conducted by counsel, for the mere purpose of contradiction. The testimony was taken for use in a case then depending; and its pertinency and materiality were under the control of counsel. It was not required that the witness should use the occasion to correct every erroneous statement made in the deposition of another witness, even to his own prejudice, under the penalty of having the omission construed into an admission of the truth of what was said, and more especially when he is a mere hearer, and no party to the conversation, so to denominate what was then going on.

In *Moffit v. Witherspoon*, 10 Ired. 185, NASH, J., declares that "it would be carrying the doctrine very far, to say that a party to a suit was bound by declarations of counsel made in his argument to the jury, though made in his presence."

Similar enunciations of limitations upon the rule are found in adjudications elsewhere, to a few of which we will refer: In *Havey*

v. *Havey*, 9 Mass. 216, a deposition taken and filed by the defendant in a previous action was produced and offered against him, on the ground that placing it on file amounted to an admission of the facts stated in it. It was rejected by the court. In *Wilkins v. Stidger*, 22 Cal. 232, the court say: "It is clear that a party to a suit is not bound by, or held to admit as true, every statement made by his witnesses during the trial of a cause, because he does not deny or contradict them at the time. A denial or contradiction under such circumstances would produce great confusion, and cause continual wrangling between the party and the witnesses."

In *Hersey v. Barton*, 23 Vt. 685, a deposition was offered containing a conversation between the plaintiff and the witness about the subject-matter in controversy between the parties to the present suit, in presence of the defendant. This was not addressed to the defendant, did not require an answer, and KELLOGG, J., for the court, thus speaks: "To hold that a person is bound upon all occasions where his adversary in his presence is making statements to others, and not addressed to him, but which are adverse to his interests, to repudiate the same, or that his silence should be taken as an admission of the truth of those statements, would in our judgment be unsound in principle and unwarranted by authority."

But a case still more in point, decided in the same court, is that of *Brainerd v. Buck*, 22 Vt. 579; s. c., 60 Am. Dec. 291. Proceedings in chancery were depending to foreclose a mortgage, and one defendant was a witness before the master. One Samuel Buck, a defendant in that suit, but not in this, made statements tending to show that the money in question in the present suit, had come into the defendant's hands. The defendant was present and did not deny it. The court declare that "the statements being in a judicial proceeding, and not directed to the defendant then present, could not call for a denial, and indeed it would have been quite irregular for him, who stood a stranger to those proceedings, to have interfered and denied any statements which may have been made to the master, by either party."

Now it would have been an impertinent interruption for the defendant to deny the statement of the witness Burke while his examination was in progress, and in giving his own testimony he was of course under the guidance of counsel and the supervision of the commissioner. It was for counsel and not the witness to determine what information was wanted and to elicit it, for him to give such

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as he possessed and counsel required. It was not a proper occasion for him to interject contradictions not germane to the subject-matter about which he was being examined, in order to escape the inference of assent drawn from his mere silence. This, in our opinion, was not demanded under the circumstances, and the evidence ought not to have been received, and allowed to be used for such purpose against the defendant.

In this ruling there is error, and the defendant is entitled to have the verdict set aside, and a *venire de novo* awarded. To which end let this be certified to the court below.

The record contains much superfluous matter, that relating to the interlocutory appeal, which must be taxed against the appellant.

Error.

Judgment reversed.

DODSON V. McADAMS.

(98 N. C. 149.)

Parent and child — grandparent — services — presumption.

If a grandparent receives his grandchild into his family as a member of it, no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services, such as a child generally renders as a member of the family.

Where the grandparent declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services, *held*, not sufficient to prove a promise to pay for her services. Such services are not gratuitous, but are presumed in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child.

ACTION for services. The opinion states the case. The plaintiff had judgment below.

John Devereux, Jr., for plaintiff.

R. H. Battle and *A. W. Graham*, for defendant.

MERRIMON, J. It seems to be settled law — certainly in this State — that if a grandfather receives his grandchild or grandchildren into his family, and treats them as members thereof — as own children — he and they are *in loco parentis et liberorum*, and hence

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if the grandchild in such case shall do labor for the grandfather, as a son or daughter does ordinarily as a member of the family of his or her father, in that case, in the absence of any agreement to the contrary, no presumption of a promise on the part of the grandfather to pay the grandchild for his labor arises; the presumption is to the contrary. The grandchild, as to his labor or services so rendered in such case, is on the same footing as a son or daughter. And this is so after the grandchild attains his majority, if the same family relation continues. This rule is founded, in large measure, upon the supposition that the father clothes, feeds, educates and supports the child, and that the latter labors and does appropriate service for the father and family in return for such fatherly care, and domestic comfort and advantage. The family relation and the nature of the service rebut the ordinary presumption that arises when labor is done for a party at his request, express or implied, of a promise on his part to pay for it.

Applying this rule, this court held in *Hussey v. Rountree*, Busbee, 111, that though a step-father is not bound to support his step-children, nor they to render him any service, yet if he support them, or they labor for him, in the absence of an express agreement, they will be deemed to have dealt with each other as parent and child and not as strangers. And in the subsequent case of *Hudson v. Lutz*, 5 Jones, 217, Chief Justice PEARSON said, citing the above-cited case with strong approval, that "the same principle applies to a grandfather and child, when the one assumes to act *in loco parentis*. In our case (that then under consideration), this relation existed to all intents and purposes. The circumstance that the plaintiff was illegitimate has no bearing on the application of the principle; the 'old man,' in the fulness of his affection, forgave the transgression of his daughter, and allowed her and her child to live with him as members of his family up to his death. The relation of the parties rebuts the presumption of a special contract, and puts the idea that he was to be paid for furnishing a home, or they were to have 'a price' for work and labor done, out of the question. In the language of RUFFIN, J., such claims ought to be frowned on by the courts and juries. To sustain them, tends to change the character of our people, cool domestic regard, and in the place of confidence, sow jealousies in families."

In such cases, the ordinary rules applicable to parent and child will be applied, and hence it is not presumed that compensation

will be paid on the part of the grandchild for board and clothing, nor on the part of the grandfather for labor and services. *Hussey v. Rountree, supra*; Schoul. Dom. Rel., § 273.

But the presumption against a promise to pay for such labor may be overthrown by an agreement to pay for the same, appearing in terms or by any proper proof to establish the same, as pointed out in *Williams v. Barnes*, 3 Dev. 349; *Young v. Herman*, decided at the present term. Schoul. Dom. Rel., §§ 269, 274.

Now it appears in evidence in the present case, that the *feme covert* plaintiff was the granddaughter of the testator of the defendant; that she was taken by and lived with him from the time she was two or three years old until she was married, at the age of twenty-three years; that after she was fourteen years old, she did much of the domestic work in and about her grandfather's home, and occasionally worked in his small crop; that she lived with him as a member of his family, and was always treated just as one of his own children; he paid for her education—such as she received—and when she was married, he provided for her just as if she had been his own child; he had said at some time, in the presence of two or three witnesses, that if she remained with him, he expected to give her a part, just as he would his own children; one testified, that he said he intended his house for her; another, that he said she was a good girl, and she should be paid for her work, etc. She occasionally did some work for herself.

Accepting the evidence as true, there was none to prove a special agreement as alleged between the testator and the *feme* plaintiff, that he would make provision in his will for her as compensation for her services, and the court properly so instructed the jury. The testimony of the *feme* plaintiff, indeed of all the witnesses—the whole of it—went to prove that she lived with her grandfather as a member of his family, and she was uniformly so treated, she so worked, and there was no evidence to prove an express or implied agreement between herself and the testator, that she should receive from him compensation for her services, other than such as she received as a member of the family. His occasional casual declarations that he intended his home for her—that she was a good girl, and should be paid for her services, were not of themselves alone evidence to go to the jury to prove such agreement, although they, with other competent facts, might make such evidence. *Young v. Herman, supra*; Schoul. Dom.

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Rel., § 269. By such agreement is meant the mutual assent and understanding of the testator and the *feme* plaintiff, appearing by express terms, or from such facts and circumstances as show it by reasonable implication. The assent and understanding of one of the parties, without that of the other, is not sufficient; there can be no agreement without such mutual assent and understanding, and this must expressly appear, or it must appear by just implication from the evidence.

The appellant in substance, requested the court to instruct the jury, that if the *feme* plaintiff was simply a member of the testator's family and so treated, as the evidence tended to prove, then she could not recover. This the court declined to do. In this there was error. The appellant, in view of the evidence, was entitled to that instruction, or the substance of it, which was not given. On the contrary, the court instructed the jury, "that the relation of grandfather and grandchild did not raise the presumption that the services of the plaintiff were gratuitous." It is true, such services were not presumed to be "gratuitous," but they were in contemplation of law, nothing to the contrary appearing, rendered in consideration of the care, protection and advantage the *feme* plaintiff had and derived from her grandfather, and the relation did raise the presumption that the plaintiff should receive only that compensation.

There is error. The appellant is entitled to have a new trial. To that end let this opinion be certified to the Superior Court according to law. It is so ordered.

Error.

Judgment reversed.

 FOOTE V. GOOCH.

(96 N. C. 205.)

Fixtures — trade — mortgagor.

Where the mortgagor of a foundry and machine shop puts in new machinery, such as vices, lathes, pulleys, belts, shafting, etc., intended by him "to be used permanently with the foundry property, and to enhance its value," he may not remove them on foreclosure.

CLAIM of machinery as personalty. The head-note shows the case. The defendant had judgment below.

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John A. Moore, for plaintiff.

W. H. Day, *R. O. Burton* and *Jos. B. Batchelor*, for defendant.

SMITH, C. J. The term "fixtures," as designating personal chattels so attached or affixed to the realty as to become part of it, has a different meaning in its application to the relations of different parties as vendor and vendee, representative and devisee or heir, landlord and tenant, the right to detach and remove, being most favorable to the latter. The rule that governs in case of an absolute sale and conveyance is equally applicable to a mortgage, which is but a form of conveyance, and what would pass to the vendee, as his own absolutely, will pass to the mortgagee as a security. A mortgagor left in possession and use, who improves the premises by the erection of new works, and the introduction of new machinery, as a means of enlarging his operations, and intended to be a permanent annexation to the freehold, is not at liberty to impair the increased security provided for his debt by removing them.

Trade fixtures even, put up for the purpose of carrying on business since the date of the mortgage, were declared by Lord ROMILY, in *Cuthwick v. Swindell*, L. R., 3 Eq. 249, "so far as they are affixed to the freehold, go with it to the mortgagee." The authorities in support of this proposition will be found, and the subject discussed, in Tyler on Fixtures, at page 566 *et seq.*

The intent with which the annexation is made enters largely into the question of permanency and the right to remove. Upon this point, the plaintiff himself testified that the machinery claimed by him, was "for the use of the property" which he expected to redeem, and the lathe was "to be used permanently with the shop." He adds that "all the property claimed was placed there by me to be permanently used with the foundry property, and to enhance its value."

The cases in our own reports are in the same line. *Bryan v. Lawrence*, 5 Jones, 337; *Latham v. Blakely*, 70 N. C. 368; *Bond v. Coke*, 71 N. C. 97; *Deal v. Palmer*, 72 N. C. 582.

In *Moore v. Valentine*, 77 N. C. 188, the vendee continued in possession under his contract, and put up machinery in order to the more successful conduct of mining operations. He was afterward adjudged a bankrupt, and at the sale by his assignee, the plaintiff became the purchaser of his estate. Delivering the opinion

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PEARSON, C. J., says: "When a mortgagor, who is allowed to retain possession, or a vendee under a bond for title, is let into possession, makes improvements and erects fixtures, he does so for the purpose of enhancing the value of the property, *and having made this addition to the land* (the italics are in the opinion), he is not at liberty to subtract it, on the ground that by his own default he is not able to get the title."

The test then is the actual attaching or affixing the articles of personalty to the freehold, so that they become parcel of the realty, and these passed to the purchaser at the sale under the mortgage. We cannot undertake to say whether all the articles enumerated in the schedule fulfil the requirements; and as the appellant must show error, we must assume that they do.

There is no error, and the judgment must be affirmed.

No error.

Judgment affirmed.

VAUGHAN V. MURFREESBORO.

(68 N. C. 317.)

Taxation — "property" — credits, money and bonds.

A statute allowing a municipal corporation to tax all persons and property within the town does not authorize a tax on solvent credits, money, or bonds. (*See note, p. 415.*)

CONTROVERSY without action, to determine liability to taxation. The opinion shows the case. The defendant had judgment below.

D. A. Barnes, for plaintiff.

R. W. Winborne, for defendant.

SMITH, C. J. A very similar controversy sprung up between the tax-paying residents and corporate authorities of the city of Raleigh, and was determined in *Pullen v. Commissioners*, 68 N. C. 451. The charter, as it then existed, authorized the commissioners, in order to raise a fund to meet the expenses of the government of the city, to annually levy and collect taxes: 1st, on real estate in the city in a limited amount; 2d, on taxable polls, limited also in amount,

and upon six other enumerated subjects of taxation, in none of which was personal property mentioned.

But the Constitution, art. 7, § 9, commands, that "all taxes levied in any county, city, town or township, shall be uniform and *ad valorem* upon all property in the same, except property exempt by this Constitution," by force of which, notwithstanding the omission in the charter, personal as well as real property must be assessed and subjected to the same public burden. The first clause was therefore to be construed as if both kinds of property had been specified, and in the light shed upon the subject by other provisions of the Constitution. Delivering the brief opinion of the court, which seems to have been guided by the lucid argument of counsel, as to the sense in which the word "property" is used in that instrument, the chief justice remarks: "In regard to that word, by the by, we see that the Constitution does not make it include 'money, credits, investments in bonds, etc.' 'Real and personal property' is used in a sense to exclude such credits and investments. Art. 5, § 3."

Accepting this interpretation of the general term "property" with the prefix "real and personal" as used in the other section, "credits, moneys, investments in bonds, etc.," would not be included, unless it can be seen from the context that the word was employed in a more comprehensive sense and to fill a larger sphere of operation except by force of the statute (Code, § 3765, par. 6), enlarging its import.

So far from this, it seems to be as restrictive as when used in the Constitution. The charter imposes the liability only upon "persons and property within the town," and upon such only as are subject to county taxation under the general law, and its maximum measure is upon an *ad valorem* estimate of value. There are no associate words to indicate a larger meaning than the word itself conveys, but on the contrary, the property must be located within the corporate limits, excluding such as has only the *situs* of the owner.

A similar restricted import has been given to the term in testamentary dispositions in several adjudications.

In *Pippin v. Ellison*, 12 Ired. 61; s. c., 55 Am. Dec. 403, PEARSON, J., says: "The word 'estate' has a broader signification than the word 'property.' The former includes choses in action; the latter does not, and in reference to personalty is confined to 'goods,

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which term embraces things inanimate, furniture, farming utensils, etc.; and chattels, which term embraces living things—slaves, horses, cattle, hogs, etc.” This, of course, has reference to the residuary disposition of the testator’s estate. *Scales v. Scales*, 6 Jones Eq. 163; *Hastings v. Earp*, Phil. Eq. 5.

In *Hogan v. Hogan*, 63 N. C. 222, the bequest was “and should there be any thing at my death undivided, it is my wish that it be sold, and equally divided among my four sons, after paying my funeral expenses and all just debts.” In the opinion delivered by READE, J., the cases where a restrictive meaning is put upon the words “estate” and “property” are reviewed and distinguished from that then before the court, in that the property was to be sold, and the proceeds divided, and the words were of more limited signification, and not as broad as “any thing,” here used by the testator. But the previous rulings are put upon the ground, that as “credits and money are not the proper subjects of sale, the intention cannot be imputed to the testator to embrace such in the direction to sell and distribute, and this method of interpretation, if correct, would equally apply to the clause recited. Nor do we see clearly the distinction pointed out in the terms of the bequests. In the other cases there was to be a sale and the proceeds divided, and is not this the necessary consequence of executing a direction to sell and divide, for after a sale, what was there to divide but the proceeds arising from the sale? The decisions are therefore not in harmony, and are referred to as showing how the usual import of words may be restrained in their operation by the context.

Aside from these interpretations, we see no sufficient reason for departing from the adjudication in *Pullen v. Commissioners*, even if the reasoning were not entirely satisfactory to our own minds, and since the localizing words that follow the term must be understood as excluding such property as has no visible form or existence within the town, and attach to the person of the owner.

There is error, and the judgment must be reversed, and to this end, and that judgment be rendered for the plaintiff, this will be certified.

Error.

Judgment reversed.

NOTE BY THE REPORTER.—Cooley (Taxation, 79) says: “It has been customary to tax contracts for the payment of money, or having a money value, as the personal property of the owner. The right to do this, if ever in doubt, is now settled.” Citing *Catlin v. Hall*, 21 Vt. 152; *Champaign Bank v. Smith*.

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7 Ohio St. 42; *Cook v. Smith*, 30 N. J. L. 387. "But debts are not property." Citing *Murray v. Charleston*, 96 U. S. 432.

In *Savings Ass'n v. Austin*, 46 Cal. 415, solvent credits secured by mortgage were held to be property.

Desty (1 Taxation, 436) says: "Credits are not property, in the sense of the word as used in the Constitution, and cannot, in California, be assessed as property even if secured by mortgage." Citing *People v. Hibernia Sav. & L. Soc.*, 51 Cal. 243. This seems to overrule *Savings Ass'n v. Austin*, *supra*.

 JONES V. CALL.

(96 N. C. 387.)

Damages — speculative — profits of business.

Where the business of a manufacturer was wrongfully stopped by the defendant, and at the time of such stoppage the plaintiff had contracts which would have yielded a profit, *held*, that this profit was the proper measure of damages, and that the estimated profits of the general business were too speculative and remote.*

ACTION for damages. The head-note states the point. The plaintiff had judgment below.

John W. Graham, for plaintiff.

J. A. Baringer, L. M. Scott, Walter Coldwell, John Devereux, Jr., and J. H. Dillard, for defendants.

DAVIS, J. The evidence is not sent up with the record, and we cannot consider the exceptions to the findings of fact, dependent upon the evidence.

The first exception for our consideration is to the judgment of the court at fall term, 1883, re-referring the report to the referee, with directions, "in estimating the damages to the said Jones and Glenn, to consider the machines on the basis of a continued manufacture and sale, at the time of the interference, as set out in finding 17, and also the difference between the market value of the patents at the time of said interference, and the time of making his report, if he shall find that the difference in value, if any, was caused by said interference."

* See 56 Am. Rep. 28, and note, *post*, 488.

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If there was error in the rule laid down by the court for the guidance of the referee in this respect, then it must result that there was error in his findings of fact and conclusions of law, predicated upon the erroneous rule.

Finding 17 referred to is as follows :

"17. That the defendant Glenn and the plaintiff Jones complied with the stipulations of their said agreements, and were interfered with and stopped from the prosecution of their business and the manufacture of said machines, wrongfully and without cause, by the defendant Manfred Call."

The referee finds as a fact, that at the time of interference they had orders for one hand machine and five power machines ; and that the usual average profits realized by them on a hand machine were \$200, and on a power machine \$300, and he allows \$1,700 damages for the loss by reason of their failure to fill these orders. This loss could be ascertained with reasonable certainty, and was properly allowed, but to consider the loss of profit "on the basis of a continued manufacture and sale," from the time of interference, October 11, 1878, to March 5, 1883, is partly speculative. If a proper measure, why stop at the date of the report ? Were the services of the parties of no value in other occupations during this long period ? and if so, should they be considered ? If they were making machines at the time of the interference, as the referee finds, at a profit at the rate of \$6,000 per annum, what assurance was there that this would continue, or that they might not make them at a loss of \$6,000 the subsequent year ? As was said by counsel : "Who knows where they would have stopped, or what misfortune would have befallen them, or what other patents would have superseded this one, or whether they could by any possibility have made the same profits on machines, or would have made any ?"

We are referred by counsel for the defendant Glenn, who makes this claim for damages jointly with the plaintiff Jones, to several authorities to sustain the rule of damages insisted upon by them, in which the facts are quite different, and which are distinguishable from this.

In *Masterion v. Mayor of Brooklyn*, 7 Hill, 61, the plaintiffs had contracted for the price of \$271,600, to be paid in divers sums, as the work progressed, to furnish certain marble to build a city hall. The plaintiffs thereupon made a contract with other parties,

referring to the one entered into with the defendant, to furnish from their quarry the marble required for the erection of the building, in accordance with the terms agreed upon. They proceeded to deliver a considerable quantity of the marble, when the defendant refused to receive any more, though the plaintiffs were ready to deliver it and perform their part of the contract. The contract was for the delivery of so much marble, and it was held that the plaintiffs were entitled to damages for the gains or profits which they would have realized from the performance of their contract.

That was a contract depending upon no contingency. It was known just how much marble was to be used; the price was fixed; and the value of the contract was not merely speculative, but capable of being ascertained with reasonable certainty — in fact, in that case, with absolute certainty.

In *Oldham v. Kerchner*, 79 N. C., 106; s. c., 28 Am. Rep. 302, the plaintiffs were to grind a quantity of corn at a stipulated price per bushel, which the defendant contracted to deliver, but which he failed to do. Judge RODMAN, delivering the opinion of a majority of the court, said: "We think it is now well established, that the profits which the plaintiff would have made, if the contract had been complied with, is the measure of damages for its breach, in cases like this. There are, of course, cases within the rule, as where the profits are speculative and incapable of accurate ascertainment." That was a special contract by which the defendant agreed to pay eight cents per bushel for grinding the corn (instead of the usual toll), which was to be credited to the plaintiff on a debt which he owed the defendant. That case was unlike this, and does not apply, but the rule laid down in his dissenting opinion by the present chief justice, if not applicable to the facts of that case, is clearly applicable to this. He says: "Suppose the plaintiff had brought his action at once upon the defendant's repudiation of the contract, the damages, it would seem, must be estimated upon the same principle, as when he waits a year or more before doing it. In such case, the estimate must be purely speculative and conjectural, and the anticipated profits certainly could not be recovered. There are many contingencies attendant upon all business—the possible loss by fire, the breaking of machinery, death, sickness, and other causes may interrupt or suspend its prosecution. These cannot be estimated in advance, and profits must be largely dependent upon them. It is for this reason, that the

actual, not conjectural loss, constitutes the plaintiff's claim to compensation." We think the authorities cited in the dissenting opinion apply to this case, and are conclusive.

In *Lewis v. Rountree*, 79 N. C. 122; s. c., 28 Am. Rep. 309, the plaintiff contracted with the defendant for a certain number of barrels of rosin at a stipulated price. The defendant had notice that the plaintiff bought to ship and sell in a market other than that of the purchaser. The court said: "For the purposes of the present question, the contract of the defendant may be regarded as a contract to deliver the rosin at any usual market, to be received by the purchaser, the purchaser taking on himself the risk, trouble and expense of the transportation." The market stated was New York, and it was held that the plaintiff had a right to recover what would have been his profits in New York, if the contract had been complied with. The contract was for a specified number of barrels at a stipulated price, and the measure of the profit or loss was the difference between the price to be paid, and the price at which the plaintiff could have sold in New York, deducting the costs, and this was capable of ascertainment with reasonable certainty, and the damages were not speculative. The same distinction will be found to mark the case of *Mace v. Ramsey*, 74 N. C. 11, in regard to the hire of the boat.

Without expressing any opinion as to the correctness of the rule laid down in the case of *Clements v. State*, 77 N. C. 142, as applicable to the facts in that case, we think it has no application to this.

There was error in the rule of damages laid down by the court, upon which the referee based his amended finding of damages sustained by the plaintiff and defendant Glenn, by reason of the stoppage of the manufacture and sale of machines. The finding in the original report in this respect was correct, and the defendant's exception must be sustained as to so much of the order of re-reference as directs the referee to consider the loss of profit on the manufacture and sale of machinery, on the basis of a continued manufacture and sale, at the time of interference, as set out in finding 17. This also disposes of and sustains the exception to finding of fact "III," and conclusion of law "V," in the second report of the referee. The additional damages for loss of profits on manufacture and sale of machines from October 11, 1878, to July 30, 1883, amounting (as found by the referee) to \$26,399.84, must be deducted from the amount, and from the judgment, as rendered, for

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\$30,827.59 (\$30,827.59—\$26,399.84), reducing the amount in the judgment to the sum of \$4,427.75.

The other exceptions depend upon the findings of facts and the conclusions of law thereon, based upon evidence not excepted to, and which is not before us for review, and we can see no error.

The judgment of the court below must be modified to conform to this opinion. The costs of appeal must be paid by the plaintiff and defendants equally. *Judgment modified.*

CARTER V. WORRELL.

(98 N. C. 358.)

Wills—legacy—charge on lands.

A will devised a tract of land to the testator's son W. In another clause a pecuniary legacy to a daughter was expressly charged on this land. Another tract of land was devised to another son, C., and a pecuniary legacy was given to another daughter, I. This last legacy was not expressly charged on the land devised to C., but the will provided that C. should manage the entire estate, including the land devised to him, until the legatees and devisees became of age, and that he should pay the legacy to I. by installments. *Held*, that the legacy to I. was a charge on the land devised to C.

ACTION to charge a legacy on land. The head-note shows the facts. The plaintiff had judgment below.

B. B. Winborns and W. D. Pruden, for plaintiffs.

D. A. Barnes, for defendants.

MERRIMON, J. The court properly interpreted the provision in question of the will before us.

It is clear, we think, that the testator intended to give his land to his sons—one an infant and the other of full age—charged respectively with pecuniary legacies in favor of their two sisters. That part of it situate on the north side of the road, which it seems made a covenant line of division, he devised to Walter “after the death of his mother,” charged in the meantime with the common support of his widow and his two infant children, and with a legacy of \$1,000, subject to some indebtedness in favor of Mary Bishop, a married daughter; that part situate south of the

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same road he devised to Charles, charged with the legacy of \$500 in question.

After thus devising his land to his sons, respectively, by the second and third clauses of his will in explicit terms, he then directs that part of it devised to Walter, "that is, all that part of the farm on the north side of the road to be worked in common for the support and maintenance of my two youngest children, Ida and Walter, and their mother, until they arrive at years of accountability;" and he further, in that connection, directs that a part of the earnings of the land — that is the reasonable import of the terms and their connection — "be set aside each year," to pay his daughter, Mary Bishop, \$1,000, less such sums of money as he had given her. The testator thus showed a purpose to charge the land and in favor of the daughter named.

Having thus burdened the part of the land devised to Walter, he expresses the wish that his son Charles — his son of full age, it seems — "shall have all the management of settlement of my (his) estate, and pay off the legacy above given (that to Mary Bishop), to the best advantage." How to the "best advantage?" He directs that for that purpose, "a certain part be set aside each year" — that is, as is plainly implied by the connection in which these words are used — a certain part of the earnings of the land devised to Walter, after the death of his mother. It is pretty clear that the testator desired and intended — he so requested — that Charles should superintend and manage the part of the farm devised to Walter, certainly during the life of his mother, and perhaps until he and Ida should "arrive at the years of accountability." He could thus have fair opportunity, conveniently and "to the best advantage each year" to set aside a part of the earnings to pay the legacy in favor of Mary Bishop. /

The testator then directs that Charles "also pay unto my daughter Ida five hundred dollars, after giving her a good English education, payable in installments as he may think best." He does not in terms direct this legacy to be a charge upon Walter's part of the land during the life of his mother, or afterward, as he had directed another legacy to be; he does not direct his executor to pay it; he does not direct it to be paid out of his estate generally, but he directs Charles to pay it. Why? The reasonable inference is, because he had given Charles the whole estate in the land lying south of the road mentioned, and one-half of his interest in the mill and

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cotton gin, the latter subject to the use of the same by the widow during her life-time. He intended Charles should have the land charged with \$500 in favor of his sister Ida.

This sum he was required to pay "in installments," as he might think best. This provision is not consistent with a purpose to have the legacy paid out of the personal estate. There is no direction that it should be paid out of the personal estate. Indeed it does not appear from the will that there was such estate out of which it might have been paid. The personal property, so far as appears from the will, except certain parts of it given to the widow, was to be kept and used on the farm to be cultivated for the support of the two youngest children and their mother, and the payment of the legacy to Mary Bishop.

The interpretation thus given renders the several provisions of the will reasonably consistent, and gives effect to the general purpose of the testator to divide his land between his two sons. Judgment affirmed.

No error.

Judgment affirmed.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

NOEL V. KINNEY.

(100 N. Y. 74.)

Marriage — contract for benefit of wife's estate — partnership.

Where a wife authorizes her husband to contract concerning and for the benefit of her separate estate, and in so doing to use the name of a firm ostensibly composed of her husband and herself, she is liable upon an obligation executed by him in that form for that purpose. *

ACTION on a promissory note. The opinion states the facts. The defendant had judgment below.

Nicholas P. O'Brien, for appellant.

G. Storms Carpenter, for respondent.

DANFORTH, J. This action is upon a note signed "J. P. Kinney & Co.," payable to the order of plaintiff at bank for \$505, value received. The complaint contains allegations usual in such cases, and sufficient to charge the defendants, as partners, under the name affixed to the note. Frederica M. Kinney alone answered, and her sole defense is, that at the time stated she was a married woman, and that the note was executed and delivered by her husband; there is however no allegation that it was made without her knowledge and consent, nor that it was made without her authority. Upon the trial the plaintiff put the note in evidence, and the

* See *LeGrand v. Bufaula Nat. Bank*, ante, 140; *Rogers v. Un. Cent. Ins. Co.*, post.

defendant proved her marriage with the other defendant. There was evidence from which the jury might have found that she was the owner of improved real estate in the city of Brooklyn; that the consideration of the note was the purchase-price of mirrors placed in houses built upon her land and that the mirrors were unpaid for. The note was fairly taken and the consideration delivered upon the representation by the husband that the wife was the sole owner of the property and that the name of J. P. Kinney & Co. was used as a mere matter of convenience in transacting her business. It does not appear that there was any business except in relation to the houses. No question was made as to the authority of the defendant's husband to execute the note, nor as to the truth of his representations.

The defendant Frederica moved to dismiss the complaint upon the ground that as to her the note was invalid; "its form," as her counsel stated, "showing it was not given in respect to her separate business or estate." The trial judge directed a verdict for the plaintiff subject to the opinion of the court. It was so rendered, but on motion of the defendant's counsel, afterward set aside by the same judge, and judgment ordered for the defendant. Exceptions taken by the plaintiffs to this ruling were directed to be heard in the first instance at General Term, judgment in the meantime to be suspended. The General Term overruled the exceptions and ordered judgment for the defendant.

It is obvious that the contract, in fulfillment of which the note was given, was of value to the defendant, for by it she acquired articles for the improvement of her property. She retains those articles, and has so far avoided payment upon the ground that she and her husband, upon contracting and consummating marriage, became one person, and so incapable of thenceforth contracting one with the other; that therefore they could not be partners, and as the contract sued on was, in form, a copartnership contract, it could not be enforced against her. If this is the present rule of law, then the statutes which enable the woman to acquire and hold property, to bargain, sell, assign and transfer it, to carry on any trade or business and perform any labor or service on her own account, and which protect her in the enjoyment of her earnings from her trade, business, labor or services, and permit her to use and invest these earnings, are effectual only so far that she may alone or jointly with any person or persons, save her husband, derive profit

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and increase from her work and gain from the use of her estate. If they are to be so limited in her favor, they may easily, as in this instance, become not merely enabling statutes for her benefit, but also, in her hands, instrumentalities of fraud.

Upon the precise question presented, the opinion of the court below assumes that the decisions of other courts are conflicting, but we are referred to no case in this court where a woman has successfully asserted her coverture as a defense to an action for the price of goods purchased by her, and I am unable to see why, as against creditors, she should be permitted to interpose the mere form of her promise as an obstacle to their recovery. It is settled that the things which the statutes above referred to permit her to do in person, she may also do by another as her agent. This is necessarily so, for she is allowed to act in respect to them as if unmarried; and it cannot be doubted that the improvement of her land or the management of her personal property, whether for preservation or business, may be conducted by her by means of any agency which any other owner of property might employ, and that the produce and increase thereof will be hers. *Knapp v. Smith*, 27 N. Y. 277, 278; *Abbey v. Deyo*, 44 N. Y. 343, 344. So she may do those things through her husband as her agent. *Abbey v. Deyo*, *supra*; *Rowe v. Smith*, 45 N. Y. 230. She may also have such a community of interest with him in relation to real estate as will render her liable for his frauds relating to it, and when he, professing to act as her agent, makes false representations, although without her knowledge and she receives the proceeds, she cannot retain the fruits of his fraud. *Krumm v. Beach*, 96 N. Y. 398.

Again as to all contracts relating to her separate estate, or made in the course of her separate business, she stands at law on the same footing as if unmarried, and can therefore make negotiable paper which will be governed by the law merchant, and can be sued upon in the ordinary way by general complaint, and without special statements. *Frecking v. Rolland*, 53 N. Y. 422. Nor can she escape liability because she and her husband are joint makers of the note sued on. In *Frecking v. Rolland*, *supra*, the action was on a joint promissory note signed by the defendants, who were husband and wife. He set up usury and she set up coverture. The court directed a verdict for the wife, and the jury gave a verdict against the husband. The creditor appealed. The General Term

affirmed the verdict in favor of the wife, and the creditor appealed to this court. Against the appeal it was argued (1st), that being a married woman she was not liable for the note in suit; (2d) that the complaint being general and not specific, was insufficient to charge her property. Neither objection prevailed, and the judgment in her favor was reversed. There the husband, acting for himself and as the agent of his wife, borrowed money with which to pay for a factory bought by her. The money was loaned to them, and was in part so applied. The note was given for the money loaned and for services. The court, in answering the defendant's objections, show that the capacity of a married woman to make contracts relating to her separate business is incident to the power to conduct it, since the latter would be barren and useless if disconnected with the right to conduct it in the way and by the means usually employed. In the case cited she became a joint contractor with her husband, but she was as much bound to perform the joint engagement as if the undertaking had been several, and she did not escape liability because her joint contractor was her husband. It was not necessary to inquire in that case whether the one paying could obtain contribution from the other, nor is it necessary to go into that question here. In that case both undertook to pay the creditor; in this case both undertake to pay the creditor. Can it make a difference in the measure of liability that in one case the married woman entered in her own name and her husband in his name in the execution of a joint obligation, and in the other case adopted a name which represents a joint liability, which may in effect also be several? Partners are at once principals and agents — each represents the other — and if in the relation of partnership there are obligations which a married woman cannot enforce against her husband, or the husband against the wife, they involve no feature of the present action, which asserts only the obligation of a debtor to discharge her debt, or the obligation of a promisor to fulfill her promise.

More like the present case is that of *Scott v. Conway*, 58 N. Y. 619, where, in an action for the price of labor and materials supplied to a theater carried on by Sarah G. Conway and her husband, Frederick B., under the name of "Mrs. F. B. Conway's Brooklyn Theater," and in which the wife and husband were jointly interested, it was held to be no defense against one who dealt with her in ignorance of the partnership that she had a dormant partner.

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and that the rule was not changed by the fact that the partner was her husband.

In *Bittler v. Rathman*, 61 N. Y. 512, it was held that a married woman, who in secret trust for her husband becomes a member of a copartnership, is to be regarded as the owner of the interest she represents, and might maintain an action for the dissolution of the copartnership and for an accounting. The defendant in that case denied that she was a partner and asserted that he alone was interested in the business, claiming that being a married woman she could not in law be his partner. The court held otherwise, and also that having suffered herself to be regarded by the public as a partner, she was liable as such to the creditors of the ostensible firm, although it might be otherwise in respect to her husband and his creditors. It would seem therefore that by becoming a partner either with a husband or another person a married woman loses no right of property. And no principle is suggested upon which her estate can be increased at the expense of creditors, nor how either in her own name or in her own name and that of another, or with another, she can purchase goods on credit to the advantage of her separate estate and not become liable for its payment. In *Coleman v. Burr*, 93 N. Y. 17; s. c., 45 Am. Rep. 160, cited by the appellant, the sole question was whether the conveyance of property by the husband to his wife was sustained by a consideration good as against his creditors, who impeached it. Here the wife was as capable of contracting as if she had been unmarried, as capable of adding to her estate by fresh acquisitions, and she should not be permitted to escape payment or performance by joining to her own name that of her husband, or by combining the two into a firm or partnership name. It was by that name she chose to contract, and as between herself and creditors she is bound by it. Individuals may be liable as partners to third persons, while as between themselves they are not. Here then the question is not between husband and wife. Assume that as to and with him she has no capacity, it by no means follows that she shall not be held upon a contract made by him upon a consideration moving to her, where a third person, who parted with that consideration in reliance upon the husband's apparent — and which turns out to have been a real agency, seeks to enforce the contract. If the adoption of a firm name was a mere contrivance to carry on the business jointly, and at the same time put the property acquired and added to the wife's separate property

out of the reach of creditors dealing with either *bona fide* as the partner of the other, it should not be permitted to have that effect. If as the testimony shows, the wife was the sole owner of the property, that the husband had no interest in it, but that for convenience they were doing her business in the name of J. P. Kinney & Co., her liability for a debt contracted in that name is entirely consistent with the fact, if it be a fact, that as between the parties themselves no partnership exists. This is so, although the plaintiff alleges in the complaint that the defendants are partners, and that allegation is not denied. For the purposes of the action it may be true. The plaintiff gave credit to them as such, but the goods he sold were intended by them to be annexed to the wife's separate estate, and they were so annexed. If the arrangement was valid between all parties there is no pretense of a defense. If invalid only as between the defendants, the wife, who received the fruits of the transaction, cannot as against a creditor assert its invalidity. Although married she may be estopped by her acts and declarations in any matter in respect of which she is capable of acting *sui juris*. *Bodine v. Killean*, 53 N. Y. 93. In this instance the plaintiff proved the contract, that it was made by her authorized agent and that it had reference to the improvement and benefit of her separate estate. She had capacity to do all these things, and if the arrangement, which led to the use of her husband's name as joint promisor or partner, was beyond her power to enter into, she must meet that liability without regard to any question whether her husband is also liable, or as to what rights of indemnity, or otherwise, she might have against him. She was a principal and he was her agent. He neither exceeded his power nor were his acts to her prejudice, and if by reason of any technical incapacity they could not contract with each other, or together as constituting that artificial entity, a firm or copartnership (a question we do not decide), she is liable and the contract enforceable against her in favor of the plaintiff whose property has been added to her estate upon the strength of a promise made in her name by her authorized agent.

We think the court erred in directing judgment for the defendant. It should be reversed and the plaintiff have judgment upon the verdict.

All concur.

Judgment accordingly.

Christenson v. Eno.

CHRISTENSON V. ENO.

(106 N. Y. 97.)

Corporation — gratuitous stock — liability of holder to creditor.

A corporation transferred shares of its stock and its bonds to the defendant gratuitously. The defendant sold the bonds. None of the property of the corporation had been applied in payment of the bonds. *Held*, that a creditor of the corporation could not compel the defendant to pay for the stock or account for the bonds.

ACTION by a judgment-creditor of a corporation to compel a stockholder to pay for stock and account for bonds. The opinion states the point. The plaintiff had judgment below.

William Man, for appellant.

C. E. Tracy, for respondent.

ANDREWS, J. The judgment below proceeds on the ground that the forty per cent credited as paid on the twenty-five shares of stock of the Illinois and St. Louis Bridge Company, issued to the defendant Eno in 1871, but which was not in fact paid, and also the sum of \$5,332.18, realized by him on the sale of second mortgage bonds of the company, received as his share on the distribution of the same among stockholders, pursuant to the resolution of the company of December 20, 1871, were equitable assets in the hands of the defendant Eno, applicable to the payment of the debts of the corporation, and which the plaintiff, as a judgment and execution creditor, may reach in this action and have applied to the satisfaction of his judgment. It is very plain, upon the facts, that the plaintiff, in asserting this claim, cannot stand upon any right existing in the corporation itself to proceed against the defendant Eno. The transactions by which he acquired the shares as paid up shares to the extent of forty per cent of their nominal amount, and received the bonds, created no obligation as between him and the company to pay the amount unpaid on the stock or to account to the company for the bonds or their proceeds. As between Eno and the company it was not intended that the former should be accountable to the company for the amount unpaid on the stock or for the bonds. Viewing the transactions in the light most favorable to the

plaintiff, the credit on the stock and the transfer of the bonds were intended as a gratuity to the stockholders who had been called upon to pay calls upon their original subscriptions in excess of what was expected and of what was represented would be necessary at the commencement of the enterprise. There can be no doubt that as between the corporation and its stockholders these transactions were binding according to the actual intention. The corporation itself would have no standing to demand that the defendant Eno should pay the forty per cent on the stock which it acknowledged had been paid, or that he should account for the proceeds of the bonds. The claim of the plaintiff therefore must be maintained, if at all, not in right of the corporation, or by way of equitable subrogation to any right of the corporation against Eno, but in hostility to the arrangement between them, under which he received the stock and bonds. The plaintiff, to entitle himself to the relief demanded, is compelled to maintain, that as a creditor of the corporation he has rights superior to those of the corporation itself and may hold the defendant to account for the unpaid forty per cent on the stock as though he had been a subscriber therefor, and for the proceeds of the bonds as though he had purchased them of the corporation, or had sold them on its account. So far as respects the claim to recover the forty per cent unpaid on the twenty-five shares of stock, we understand it is placed, by the learned counsel for the plaintiff, mainly on the proposition that the capital stock of a corporation is a trust fund for the security of creditors, which cannot be given away or distributed among stockholders so long as debts of the corporation remain unpaid, and that the transaction in question was a violation of this principle. The general principle asserted is doubtless well founded, but if it had an appropriate application in the present case, the plaintiff would encounter some difficulty under the authorities in this State, in maintaining a separate action as an individual creditor of the corporation to reach assets which constitute a trust fund, not for the protection of one creditor only, but equally for all the creditors of the corporation. *Griffith v. Mangam*, 73 N. Y. 611, and cases cited. But passing this, we are of opinion that the forty per cent, credited on the twenty-five shares of stock issued to the defendant Eno, cannot be considered as, and does not constitute a trust fund applicable to the payment of creditors. The capital of a corporation consists of its funds, securities, credits and property of what-

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ever kind which it possesses. The word "capital" applied to corporations is often used interchangeably with the words "capital stock," and both are frequently used to express the same thing—the property and assets of the corporation. Strictly, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise. See *Burrall v. Bushwick R. Co.*, 75 N. Y. 211, 212, and cases cited. It may be admitted that the liability of subscribers on unpaid stock subscriptions constitutes an asset of the corporation, which cannot be surrendered or given up by the corporation without consideration, to the prejudice of creditors. It is not claimed that there is any express prohibition in the charter of the bridge company against issuing shares purporting to be fully paid without actual payment. The charter authorizes books of subscription to the stock to be opened. The most that could be claimed from this provision is that by implication it prohibits the issue of stock except to actual subscribers who should undertake to pay the nominal amount of the shares when required. There is no pretense that the defendant Eno ever subscribed for the twenty-five shares of bonus stock (so called), or entered into any engagement to pay the forty per cent credited thereon. This was distinctly contrary to the intention of all parties. The plaintiff seeks to charge him as though he had subscribed for the stock and entered into a contract obligation with the company to pay the forty per cent. We can see no ground upon which he can be made to respond to the creditors of the company as upon an unpaid subscription. Assuming that the transaction as to the company was *ultra vires*, or that it could not give away its shares, the transaction in that view was simply a nullity, and Eno got nothing as against any one entitled to question the transaction. But it did not convert him into a debtor of the company for the forty per cent. He entered into no contract to pay it. He had received nothing on account of the twenty-five shares, and it is not claimed that the charter in terms imposes the liability claimed. The unissued shares of a corporation are not assets. When issued they represent a proportionate interest in the shareholder in the corporate property—an interest however subordinate to the claims of creditors. There are unquestioned public evils growing out of the creation and multiplication of shares of stock in corporations not based upon corporate property.

The remedy is with the legislature. But the liability of a shareholder to pay for stock does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract. *Seymour v. Sturgess*, 26 N. Y. 134; *In re Western Canada Oil Co.*, 1 Ch. Div. 115; *Waterhouse v. Jamieson*, L. R., 2 H. L. (Sc.) 29. The question as to the right of the plaintiff to compel the defendant to account for the sum realized by him on the sale of the bonds is affected by the fatal difficulty that the defendant has received nothing from the corporation except its promise to pay, which has never been performed. The plaintiff has withdrawn nothing from the funds of the company on account of the bonds (unless it may be a sum represented by a single interest coupon) and creditors have not been prejudiced by the transaction. It is alleged, and it was offered to be proved that the property of the company had been sold on the foreclosure of the first mortgage. It is unnecessary to consider what the rights or liabilities of the defendant would be in respect to the bonds as between himself and other creditors of the corporation on a distribution of assets, or if it had appeared that the corporation had paid the bonds issued to the defendant. The situation in either of these aspects is not presented. This is not a case of following assets of a corporation wrongfully transferred. The defendant had received none of the funds or assets of the company available to creditors. The loss on the bonds falls on those who have purchased them relying on the credit of the corporation. The situation of the general creditors has not, so far as appears, been affected by the fact that the company received nothing for the bonds. The statute of Missouri, the State from which the bridge company in part derives its existence, authorizes a creditor of a corporation, who shall have obtained judgment against it, upon which an execution has been returned *nulla bona*, to issue execution thereon against any stockholder to an extent equal in amount to the amount of stock held by him "together with any amount unpaid thereon." The courts of Missouri on an application under this statute for leave to issue execution against a person who was a director and stockholder in the bridge company, who had

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received bonus stock and bonds, granted the application and came to the conclusion that the forty per cent credited on the stock could be regarded as the amount unpaid thereon within the statute, and that the amount received on the bonds was also recoverable. *Skrainka v. Allen*, 7 Mo. App. 434, 435; a. c., 66 Mo. 384. The statutory remedy is of course not available in this State. *Lowry v. Iuman*, 46 N. Y. 119, 120. The court seems to have given much weight to the fiduciary and trust relation existing between a director of a corporation and its creditors. That relation did not exist between the defendant Eno and the creditors of the company. He was a stockholder simply, and no trust relation exists between a stockholder in a corporation and its creditors. The decision in Missouri may stand on its special circumstances, but it is not controlling in the case before us.

We are of opinion that the judgment appealed from is erroneous and that it should therefore be reversed and a new trial ordered.

All concur.

Judgment reversed.

LAFFLIN V. BUFFALO AND SOUTHWESTERN RAILROAD COMPANY.

(106 N. Y. 136.)

Railroad — negligence — construction of platform and car-steps.

The plaintiff, in attempting to step from a car on defendant's railroad to a station platform, fell between the steps and the platform and was injured. The car-steps and platform were constructed in the ordinary way, the intervening space being no more than was necessary, and no accident of the kind had happened before. *Held*, that the action could not be maintained.

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

George C. Greene, for appellant.

Wm. S. Oliver, for respondent.

EARL, J. This action was brought to recover damages for injuries sustained by the plaintiff in alighting from one of the defendant's cars, and the circumstances of the accident are as follows: The train in which she was a passenger reached the station at Dayton, in this State, on the 20th day of January, 1880, at eight o'clock

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in the evening, and she left the car for the purpose of changing to another train at that place, and in her effort to step from the car to the station platform, she fell between it and the car, and sustained the injuries of which she complains. She alleges that the space between the platform and the car was too great, and that in consequence thereof, when she stepped off from the car, she failed to reach the platform, and was thus caused to fall. There is no complaint that the platform was out of repair, or that it was improperly constructed. The only complaint is that it was too far from the car. The platform was two and one-half feet higher than the top of the iron rail, and about three feet above the top of the ground. The distance between the outer line of the car and the platform was eleven inches. There were three steps at the end of the car, and the lower one was eight inches below the top of the platform and one foot and seven inches from the side thereof. The second step was two feet and two inches from the side of the platform and about four inches lower than the top thereof. The height of the platform of the car above the iron rails was about four feet. The plaintiff passed out of the car on to the car platform and then to the second step, and without having hold of the iron railing on either side and without looking to see the station platform, she stepped out, and failing to reach it, fell.

There was no proof that the platform was not constructed in the ordinary way, nor that the space between it and the car was any greater than the exigencies of the business and the operations of the railroad required. There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary the evidence shows that the platform had been used for many years by men, women and children, and that no one but the plaintiff had ever been injured or had suffered any inconvenience on account of the distance of the platform from the cars. Thousands of men, women and children must have passed from the cars to this platform in entire safety. Under such circumstances how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? It was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient and useful. It was bound simply to exercise ordinary care, in view of the dangers attending

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its use, to make it reasonably adequate for the purpose to which it was devoted. In the case of a platform which had always been safe, and answered its purpose for men, women and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient? In the case of *Dougan v. Champlain Transportation Company*, 56 N. Y. 1, the plaintiff's intestate, a passenger, slipped under the gangway rail of a steamboat, fell overboard and was drowned; and it appeared that all the boats upon Lake Champlain were constructed in the same manner, that they had been so run for many years, and there was no proof tending to show that any one had ever before gone overboard in that way. And it was held that the plaintiff was properly nonsuited. GROVER, J., writing the opinion, said: "It will be seen that the only proof of negligence was the omission to inclose the space between the railing and deck so as to preclude the possibility of slipping under it. Had there been any proof tending to show that any such danger would be apprehended by a reasonable, prudent person, the evidence should have been submitted to the jury. But the evidence showed that all the passenger boats upon the lake had been constructed and run in the same way in this respect; that boats had so been run for a great number of years, and there was no proof tending to show that any one had ever before fallen and gone overboard under the railing, or that any such danger had been apprehended by any one. It is obvious that no such thing was likely to occur." In *Loftus v. Union Ferry Co.*, 84 N. Y. 455; s. c., 38 Am. Rep. 533, the plaintiff's intestate, a child six years old, while leaving one of defendant's boats, fell through one of the openings in the guard rails into the water and was drowned. The plaintiff recovered, and it was held that the verdict was properly set aside. ANDREWS, J., writing the opinion of the court, said: "The law does not impose upon the defendant the duty of so providing for the safety of passengers that they shall encounter no possible danger, and meet with no casualty in the use of appliances provided for it. It was possible for the defendant so to have constructed the guard that such an accident as this could not have happened, and this, so far as appears, could have been done without unreasonable expense or trouble.

If the defendant ought to have foreseen that such an accident might happen, or such an accident could have reasonably been an-

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ticipated, the omission to provide against it would be actionable negligence. But the facts rebut any inference of negligence on this ground. The company had the experience of years certifying to the sufficiency of the guard. That it was possible for a child, even a man, to get through the opening was apparent enough. But that this was likely to occur was negatived by the fact that multitudes of persons had passed over the bridge without the occurrence of such a casualty." In *Burke v. Witherbee*, 98 N. Y. 562, while an empty car was descending a mine the hook which fastened it to the cable became detached from the car and it ran down the mine and killed plaintiff's intestate. The judgment for plaintiff was reversed because there was not sufficient proof of actionable negligence on the part of the defendants. The judge writing the opinion said: "In this mine alone, cars drawn by hook must have made several hundred thousand passages without a single accident. What more could any reasonable or prudent man have to justify him in believing that this convenient appliance was also a safe and proper one? What greater or different test could it have been subjected to before a mine owner could use it without the imputation of negligence? It seems to us quite inadmissible, if not preposterous, to attribute negligence to a mine owner for using an implement which had been employed in different mines, and which under varying conditions, upon countless occasions, uniformly answered its purpose without injury to any one." The application of these authorities to this case is quite obvious. No structure is ever so made that it may not be made safer. But as a general rule, when an appliance or machine or structure, not obviously dangerous, has been in daily use for years, and has uniformly proved adequate, safe and convenient, its use may be continued without the imputation of culpable imprudence or carelessness.

On the evening when this accident happened, the evidence tends to show that it was dark, and that the platform was not plainly visible. It was somewhat lighted by light which came from the car windows, the depot windows and a lantern in the hands of the conductor; and it does not appear that it was ever lighted in any other way, or that it was usual to light such platforms in any other way. The fact that it was dark made it incumbent upon the plaintiff to take the greater care. She could have kept hold of the iron railing until her foot touched the platform, and then she would have been safe. It was not the duty

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of the defendant to furnish some one to aid her in alighting from the car.

There was some proof that about the time the plaintiff attempted to step from the car upon the platform, there was a slight jerk or jar of the car; but it does not appear that that had any thing whatever to do with the accident.

A careful consideration therefore of the whole case as it appears in this record, has led us to the conclusion that the defendant is not legally responsible for the accident which befell the plaintiff.

It was a misadventure and no rule of law will permit her to charge the misfortune in whole or in part, to the defendant.

The judgment should therefore be reversed and a new trial ordered, costs to abide event.

All concur.

Judgment reversed.

DRUCKE V. MANHATTAN RAILWAY COMPANY.

(106 N. Y. 187.)

Damages — elevated railway — diminution of business.

In an action against an elevated street railway by an adjacent lot owner for damages by occupation of the street, evidence is competent to show that since the building of the railroad the trade and business of the street has diminished and changed.

It appeared that the result was partly due to a tendency in business to move "up town." *Held*, that it was for a jury to estimate the proportion of loss chargeable to the defendant, and that a recovery for such estimated loss was proper.

ACTION for injury to plaintiff's land by occupation of a street by defendant's railway. The head-note and opinion show the points. The plaintiff had judgment below.

Julien T. Davies, Edward S. Rapallo and Charles A. Gardiner,
for appellant.

Roger Foster, for respondent.

FINCH, J. [Omitting a minor point.] The further question raised respected the proof of damages. The action shaped itself into one of trespass for the occupation and impairment of plain-

tiff's easement for the period beginning with the construction of the road and ending with the commencement of the suit. In the case of *Lahr v. Metropolitan Elevated R. Co.*, 104 N. Y. 268, three out of five members of the court voting in the case put the rule of damages upon the proposition that the road and its operation imposed upon the street an unauthorized use, and were illegal and wholly a trespass as against abutting owners not duly compensated. As a logical consequence the majority held that the damages recoverable included whatever of injury or inconvenience resulted from the structure itself, or were incidental to its use. This rule opened the door to proof of every injury traceable to the road or its operation, and was said to be that "however the damage may be inflicted, provided it be effected by an unlawful use of the street, it constituted a trespass, rendering the wrong-doer liable for the consequences of his acts." Under that rule none of the evidence offered was inadmissible, for it all tended to show how far and in what manner the plaintiff had been injured by the trespass. But the then minority of the court favored a narrower rule of damages. Yielding, as in duty bound, to the authority of the *Story* case, they admitted that so far as the road, by its construction or use, took or destroyed or impaired the abutter's easement of light, air and access, it was a trespasser, but maintained that beyond that, and for consequential damages which did not touch the easement or invade its enjoyment, it was not a trespasser, but stood under the protection of the general rule freeing it from liability for any incidental injury or annoyance resulting from its careful and lawful operation. But even that restricted rule, which has not as yet received the sanction of the court, appears not to have been violated upon the trial of this action. The judge charged "that nothing is recoverable except for interference with and occupation of plaintiff's light, air and access;" that no damages could be recovered for negligence in the construction or operation of the road since no such cause of action was pleaded, and that it made no difference in the measure of damages that the defendant had not acquired title by condemnation proceedings. The appellant does not complain of this charge, or the measure of damages applied, but does complain that evidence was admitted going quite beyond its boundaries. We are of a different opinion.

Objection was made to the proof that since the building of the elevated road the trade and business of Division street had fallen

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off, and the current of custom had largely lessened in volume and changed in character, and upon the ground that injury to the plaintiff and not to his neighbors was alone material. But to measure and appreciate that individual loss, the nature and extent of the general injury was necessarily to be considered. To ascertain how much the plaintiff was harmed by the impairment of his easement required a survey of the general facts, and a deduction from them of the particular and special damage to be estimated. The evidence tended to show, that by reason of the falling off of business, rental values on the street had seriously diminished, but also established that this result was due in part to a tendency of business to move "up town," with which the elevated roads had nothing to do. How much of the diminution of rental values was due to the construction and operation of the elevated roads, and what part of that portion was caused by the impairment of plaintiff's easement, was the problem of damages, and could only be solved by taking into view the general loss and its nature and extent, and then estimating out of it the part or share suffered by the plaintiff from the taking or impairment of his easement.

But that it is said could not be done with any certainty or precision, and left the jury to guess and speculate in reaching a result. It is often the case that damages cannot be estimated with precision and the basis of accurate calculation is wanting and inadequate. That is notably true in many cases of personal injuries. Such evidence as can be given should be given, and facts naturally tending to elucidate the extent of loss should not be withheld. But when all the proof, which in the nature of the case is fairly possible has been given, the good sense of a jury must provide the answer, and it is no defense that such judgment involves more or less of estimate and opinion, having very little to guide it. That criticism has no force in the mouth of the wrong-doer when all reasonable data have been furnished for consideration. If we inquire further into the details of the injury suffered we shall find that no proof was objected to which should have been rejected even under the narrower and more restricted rule above suggested. Smoke and gases, ashes and cinders affect and impair the easement of air. The structure itself and the passage of cars lessen the easement of light. The drippings of oil and water and possibly the frequent columns interfere with convenience of access. These are elements of damage even though the necessary concomitants of the construc-

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tion and operation of the road, and not the product of negligence, for they abridge the land owner's easement, and to that extent, at least, are subjects for redress in an action for damages. There remains but the annoyance of noise and vibration of the buildings, among the specific injuries mentioned on the trial. But no objection or exception selected these out as improper elements in the proof of damage, and the question which might involve the difference of opinion among us is not here presented.

The judgment should be affirmed, with costs.

Judgment affirmed.

All concur, except RAPALLO and PECKHAM, JJ., not voting.

**BANK OF BATAVIA V. NEW YORK, LAKE ERIE AND WESTERN
RAILROAD COMPANY.**

(106 N. Y. 186.)

Carrier — agent — bill of lading — goods not received.

A carrier having authorized an agent to issue bills of lading in its name on receipt of property for transportation, is liable upon a bill of lading issued by such agent, and transferred by the shipper to one who on the faith of it has discounted a draft on the consignee, although no property was received by the carrier.*

ACTION of damages for wrongful issue of bills of lading. The opinion states the facts. The plaintiff had judgment below.

E. C. Sprague, for appellant.

H. E. Sickels, for respondent.

FINCH, J. It is a settled doctrine of the law of agency in this State that where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith, pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice.

* See *Black v. Wilmington, etc., R. Co.* (92 N. C. 42), 53 Am. Rep. 450, and note, 458.

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North River Bank v. Aymer, 3 Hill, 262; *Griswold v. Haven*, 25 N. Y. 595, 601; s. c., 82 Am. Dec. 380; *N. Y. & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Armour v. M. C. R. Co.*, 65 N. Y. 11; s. c., 22 Am. Rep. 603. A discussion of that doctrine is no longer needed or permissible in this court, since it has survived an inquiry of the most exhaustive character, and an assault remarkable for its persistence and vigor. If there be any exception to the rule within our jurisdiction it arises in the case of municipal corporations whose structure and functions are sometimes claimed to justify a more restricted liability. The application of this rule to the case at bar has determined it in favor of the plaintiffs and we approve of that conclusion.

One Weiss was the local freight agent of the defendant corporation at Batavia, whose duty and authority it was to receive and forward freight over the defendant's road, giving a bill of lading therefor, specifying the terms of the shipment, but having no right to issue such bills except upon the actual receipt of the property for transportation. He issued bills of lading for sixty-five barrels of beans to one Williams, describing them as received to be forwarded to one Comstock, as consignee but adding with reference to the packages that their contents were unknown. Williams drew a draft on the consignee, and procured the money upon it of the plaintiff by transferring the bills of lading to secure its ultimate payment. It turned out that no barrels of beans were shipped by Williams, or delivered to the defendant, and the bills of lading were the product of a conspiracy between him and Weiss to defraud the plaintiff or such others as could be induced to advance their money upon the faith of the false bills.

It is proper to consider only that part of the learned and very able argument of the appellant's counsel which questions the application of the doctrine above stated to the facts presented. So much of it as rests upon the ground that no privity existed between the defendant and the bank may be dismissed with the observation that no privity is needed to make the estoppel available other than that which flows from the wrongful act and the consequent injury. *N. Y. & N. H. R. Co. v. Schuyler*, *supra*.

While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the

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natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued. On the contrary, he is bound by law to recognize the validity of transfers and to deliver the property only upon the production and cancellation of the bill of lading.

If he desires to limit his responsibility to a delivery to the named consignee alone, he must stamp his bills as "non-negotiable;" and where he does not do that he must be understood to intend a possible transfer of the bills and to affect the action of such transferees. In such a case the facts go far beyond the instances cited, in which an estoppel has been denied because the representations were not made to the party injured. *Mayenborg v. Haynes*, 50 N. Y. 675; *Maguire v. Seldon*, 103 N. Y. 642. Those were cases in which the representations made were not intended and could not be expected to influence the persons who relied upon them, and their knowledge of them was described as purely accidental and not anticipated. Here they were of a totally different character. The bills were made for the precise purpose, so far as the agent and Williams were concerned, of deceiving the bank by their representations, and every bill issued not stamped was issued with the expectation of the principal that it would be transferred and used in the ordinary channels of business, and be relied upon as evidence of ownership or security for advances. Those thus trusting to it and affected by it are not accidentally injured, but have done what they who issued the bill had every reason to expect. Considerations of this character provide the basis of an equitable estoppel, without reference to negotiability or directness of representation.

It is obvious also upon the case as presented, that the fact or condition essential to the authority of the agent to issue the bills of lading was one unknown to the bank and peculiarly within the knowledge of the agent and his principal. If the rule compelled the transferee to incur the peril of the existence or absence of the essential fact, it would practically end the large volume of business founded upon transfers of bills of lading. Of whom shall the lender inquire, and how ascertain the fact? Naturally he would go to the freight agent, who had already falsely declared in writing that the property had been received. Is he any more authorized to make the verbal representation than the written one? Must the lender

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get permission to go to the freight house or examine the books? If the property is grain, it may not be easy to identify, and the books, if disclosed, are the work of the same freight agent. It seems very clear that the vital fact of the shipment is one peculiarly within the knowledge of the carrier and his agent, and quite certain to be unknown to the transferee of the bill of lading, except as he relies upon the representation of the freight agent.

The recital in the bills that the contents of the packages were unknown would have left the defendant free from responsibility for a variance in the actual contents from those described in the bill, but is no defense where nothing is shipped and the bill is wholly false. The carrier cannot defend one wrong by presuming that if it had not occurred another might have taken its place. The presumption is the other way; that if an actual shipment had been made the property really delivered would have corresponded with the description in the bills. The facts of the case bring it therefore within the rule of estoppel as it is established in this court and justify the decision made.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

NORTHAMPTON NATIONAL BANK V. KIDDER.

(106 N. Y. 231.)

Negotiable instrument — transfer after maturity — stolen bonds — default — interest.

A railroad company issued mortgage bonds payable with interest semi-annually, and conditioned that in case of non-payment of interest on demand, or of default for six months in making contribution to a sinking fund stipulated in the bonds, the principal should become due in six months from such default, without further demand or notice. The bonds in suit were stolen from plaintiff in 1876 and bought by defendant in 1881. No interest had been paid for 1877, 1878 or 1879, and no contribution had been made to the sinking fund, and a suit had been commenced to foreclose the mortgage for such defaults. *Held*, that the bonds were overdue when bought by the defendant, and not having been bought by him from a *bona fide* purchaser before maturity, plaintiff was entitled to recover for conversion of the bonds.

ACTION for conversion of bonds. The opinion states the case. The plaintiff had judgment below.

W. M. Safford, for appellant.

W. G. Peckham, for respondent.

PECKHAM, J. In the year 1871, the Ohio and Mississippi Railroad Company issued what is termed a second consolidated mortgage to secure the payment of a large amount of its bonds. The bonds on their face were payable on the 1st day of April, 1911, with interest in meantime semi-annually at the rate of seven per cent, on the first days of April and October in each year, until the principal was paid, upon the presentation and surrender to the company of the coupon or interest warrant attached for each installment of interest as it became due. Each bond contained this clause: "In case of the non-payment of the interest for any half year when demanded, and the same remaining unpaid for six months, and likewise in case of default for six months in the stipulated contribution to the sinking fund hereinafter referred to, the principal shall, without further demand or notice, become due and payable from and after the expiration of six months from the date of such default, with interest then accrued and in arrear." The bonds, in referring to the mortgage which secured their payment, also contained a statement as follows: "And said mortgage also provides a sinking fund for the ultimate redemption of said bonds, commencing with payment into the sinking fund at the rate of \$20,000 a year, and so graded and regulated as to provide for taking up the whole amount of the bonds before their maturity."

By a written statement contained in the case and headed "facts" (the case containing none of the evidence given on the trial), it appears that the plaintiff was, on the 26th day of January, 1876, the owner of two \$1,000 second mortgage bonds of the issue above described, and on that day they were stolen from it by masked burglars. It further appears in the statement that no interest was paid on any of the second mortgage bonds for the years 1877, 1878 and April, 1879, nor was any contribution made to the sinking fund during the period from 1876 to December, 1882, inclusive, "and the defaults have never been made good for any of the payments which became due from 1876 to 1882." A foreclosure of the second consolidated mortgage (the statement continues), "because of the above mentioned defaults in the interest and sinking funds on the bonds in suit, was begun shortly before the appoint-

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ment of receivers who were appointed on the 17th of November, 1876." At the time of the trial of this action (December, 1882), this foreclosure suit was still pending and had been from the time of its commencement. The defendants, on the 28th of April, 1881, had orders to buy \$2,000 of these bonds, and they purchased the bonds in question and acted through brokers in their purchase. Whether they paid a valuable consideration for the bonds or not is a disputed inference from the language used in the statement of facts, and the General Term held that the fact of such purchase for value did not appear, and upon that ground gave judgment for the plaintiff on a verdict directed for it at the Circuit, subject to the opinion of the General Term. Whether the court was right in that construction of the meaning of the language used is not important in the view we take of the case.

The bonds, when they were purchased by defendants in April, 1881, were overdue, and had thus ceased to be negotiable in the sense which frees the transaction from all inquiry into the rights of antecedent holders. *Vermilye v. Adams Express Co.*, 21 Wall. 138 at 145; *Morgan v. United States*, 113 U. S. 476, 499; *Hinckley v. Merchants' Nat. Bank*, 131 Mass. 147. After maturity a purchaser for value is not a *bona fide* purchaser to the extent of being protected in his purchase (unless he succeeds to the rights of such a holder who became such before maturity), for the fact of non-payment discredits the instrument and deprives it of any immunity, which before maturity was secured to it in favor of a *bona fide* purchaser for value, without actual notice of any defect either in the obligation or the title.

The defendants' counsel however very strenuously denies the statement that the bonds were overdue when purchased. He says that no legal demand of the interest on the coupons was ever proved, and that by the terms of the bonds the interest must remain unpaid for six months after demand before the principal could become due. The language heretofore quoted, which was used in the statement, implies however that a demand was made, or that the company had done that which dispensed with its necessity.

In a legal document of such precision as a statement of facts should be, and is, where the vital point of the case rests upon the language used in this regard, the word "defaults" would never be used to describe a mere failure to pay money as interest on coupons which had not been presented, or any demand of payment made,

or any action taken by the company to dispense with such demand. The word means, as thus used, the failure or default of the company to do that which it was under a legal obligation to do, and such default may have occurred by a refusal to pay any coupons upon the presentation of a part only, and by the action of the company in publicly announcing its inability to pay and its purpose to default as to all its legal obligations of this nature. This meaning of the word is rendered still plainer, when in the same statement there is contained the further fact that the defaults have never been made good for any of the payments which became due from 1876 to 1882, and that the foreclosure of the second mortgage was commenced because of the defaults in the payment of the interest and of the amount due the sinking fund. It is idle to claim that such language would be used in regard to any fact other than a legal default consequent upon a proper demand, or else in regard to some action which dispensed with its necessity and was equivalent to a refusal to pay upon demand. Under no other circumstances could it be justly or truly said that the company had made any default in the full performance of all its obligations as to payments, and under no other circumstances would such a word be used in a legal document of this character.

Two cases were cited by the counsel for the appellants to show that a default in the payment of interest did not make the bonds overdue. They were *Railway Company v. Sprague*, 103 U. S. 756, and *Morgan v. United States*, 113 U. S. 476. Both of these cases have been already cited upon another proposition. Neither of them sustains this claim. In the first the condition was that the principal of the bond should become due if an installment of interest due should remain unpaid for six months after a demand should be made for the payment of the same. There was no evidence that any demand had ever been made, and it was not stated that the company had made any default in the payment of interest, and the court held that the mere presence on the bond of a past due and unpaid coupon was not evidence of a default. In regard to such coupons, the court said: "Coupons are separable obligations for the interest payable on demand. It constantly arises that they are not demanded for weeks and months, and sometimes years, after they are due. As they bear interest after maturity, it will frequently happen that the owner of a bond who holds it as an investment will keep the coupon for the same purpose." In the present case the statement

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that there had been a default, for which a foreclosure was commenced and receivers appointed, is as has been said, equivalent to a statement that the company had been guilty of such a violation of the stipulations of the bond as made the principal due at once.

In the second case the court held that a so-called five-twenty government bond which had been called for payment after the lapse of five years, and a day named for its payment, after which interest would cease, was not an overdue bond; that the penalty for the non-presentment for payment by the day appointed was only the loss of interest from that time, and that the bond was not overdue within the principle permitting inquiry regarding overdue paper as to its origin or title in the hands of a *bona fide* purchaser for value, and without actual notice until after the lapse of the twenty years named in the bond for its unconditional payment. It was stated that there was a distinction to be observed between a bond which was redeemable after five and within twenty years, at the discretion of the government, and one which was payable absolutely at a certain time, and that in the case then before the court the only penalty prescribed for the non-presentment for payment on or before the day named in the call was the loss of future interest. In no other way was the original contract altered, and no other disability was imposed upon the holder, nor any other immunity taken from him, and the bond continued to stand upon its statutory basis as a bond redeemable at the treasury on demand, without interest after the maturity of the call, payable according to its original terms, and not overdue in the commercial sense till after the day of unconditional payment.

In the case at bar when the defaults had occurred, and the condition of the bond had therefore attached, the principal, by the very terms of the bond, became due at once.

Again there can be no doubt as to there having been a default arising from the non-payment of the promised amounts into the sinking fund as provided for in the bonds. This failure is stated in plain language in the case. It cannot even be argued here (assuming the argument would be sound, which we do not decide) that the mere failure to pay, either the interest or the promised amount, into the sinking fund, would not in and of itself, render the principal of the bonds due without some action looking to that end on the part of the bondholders or the trustees under the mortgage, because it was simply a privilege extended to them to so consider it at their election, which until some action looking to its

enforcement should be taken on their part, rested in abeyance and might be waived. The answer is there was an election in this case. The action to foreclose the mortgage, based upon both these defaults, was such election, and the defendants, when they purchased the bonds, knew that the company was in the hands of receivers.

The case therefore stands in this condition: The plaintiff proved that in January, 1876, it was the owner of these bonds and at that time they were stolen from it by means of a burglary. The thief, of course, got no title to them. The ownership and the theft of the bonds having been proved (assuming them to be commercial paper), the *onus* was cast upon the defendants to show that they were, or had succeeded to the rights of *bona fide* holders. *Bank of Corlland v. Green*, 43 N. Y. 298; *Farmers' Nat. Bk. v. Noxon*, 45 N. Y. 762; *Bank of N. Y. v. Carll*, 55 N. Y. 440, per CHURCH, C. J. They were not *bona fide* holders for they purchased paper which was overdue at the time of their purchase, and if it be conceded that purchasers of such paper can succeed to the rights of *bona fide* holders (see *Miller v. Tulcott*, 54 N. Y. 114), yet there is no proof of that nature in this case, as there is no proof that any holder succeeding the thief acquired the bonds before their dishonor as overdue paper, and there is no presumption to be indulged in, in favor of defendants, that the thief negotiated the bonds before they became overdue. This precise question as to the presumption in said case has been thus decided in Massachusetts, and, as we believe, correctly. *Hinckley v. Merchants' Nat. Bk.*, 131 Mass. 147.

Lastly, we think there was no evidence of any legal waiver of the election to consider the principal of the bonds due. Some portion of past due coupons, it seems, was paid to the plaintiffs in foreclosure suit (in which this plaintiff had intervened and become a party plaintiff), but it seems that it was paid in accordance with a provision contained in the mortgage in case of foreclosure thereof, and evidently was a payment made in recognition of the legality of the foreclosure proceedings, and the receipt of the money was not in any manner intended as a waiver of the election once and conclusively made by the bondholders or their trustees. At all events there was no pretense of a waiver of the default as to the payment into the sinking fund.

The defendants have failed to show any defense to plaintiff's demand, and the judgment in its favor must be affirmed, with costs.

All concur.

Judgment affirmed.

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VAIL V. LONG ISLAND RAILROAD COMPANY.

(106 N. Y. 233.)

Deed — for highway — condition subsequent.

A warranty deed for value conveyed a strip of land to a town, and its "assignees forever," with the following clause succeeding the description: "To be used as a highway, with all the privileges thereunto belonging for such purposes only, with the appurtenances and all the estate, title and interest of the parties of the first part therein. *Held*, that the fee passed. (*See note*, p. 451.)

ACTION of trespass. The opinion states the case. The plaintiff had judgment below.

E. B. Hinsdale, for appellant.

Timothy M. Griffing, for respondent.

ANDREWS, J. The complaint alleged an unlawful entry by the defendant on the lands of the plaintiff for the purpose of constructing a side track of the defendant's road thereon, to be used in connection with its depot at Riverhead, and for depositing cars, engine, and freight, and loading and unloading cars. With a view to equitable relief by injunction it was averred that the acts of the defendant would occasion great injury, annoyance and nuisance to the plaintiff, his family, business and dwelling-house, the latter being only one hundred and eleven feet from the main track of the defendant's road. The defendant in its answer, among other things, put in issue the plaintiff's title to the land over which the side track was being constructed. The judge before whom the action was tried found that the plaintiff was owner in fee of an undivided sixth part of the land occupied by the side track, and that the defendant had no title thereto, and ordered judgment in favor of the plaintiff restraining the defendant from occupying or using the premises. The plaintiff in his complaint and upon the trial rested his right to recover exclusively upon his legal title to the land, and the invasion of his right as owner by the act of the defendant. This was the issue tried, and it was found by the court for the plaintiff, and the judgment was based upon and pursued the complaint and finding. The correctness of the judgment must de-

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pend therefore upon the correctness of the finding upon the question of title. The General Term however, without passing upon the question of title, affirmed the judgment on the ground that independently of the question of the ownership of the soil, the plaintiff had rights as abutting owner in the highway, over which the track was laid, which were affected by the act of the defendant and entitled the plaintiff, on account of the special injury suffered by him, to maintain the action. *Mahady v. Bushwick R. Co.*, 91 N. Y. 148. But this ground was not suggested in the pleadings, nor, so far as appears, on the trial. The complaint made no reference to a highway, and the fact that the defendant's side track was in the highway appeared for the first time on the trial. It would be very unjust to affirm the case upon a ground so foreign to the issue presented by the pleadings. The plaintiff must therefore stand or fall upon the question of legal title. It is conceded that the land embraced in the highway was originally owned by one Charles Vail, the father of the plaintiff, who died leaving a will, which was duly proved, by which he devised to his six children, as residuary devisees, his lands not specifically devised. The specific devises in the will did not embrace the part of the highway over which the side track of the defendant is laid. To meet the *prima facie* evidence of title to the *locus in quo* in the six children of the testator, the defendant put in evidence a deed, executed in 1848 by the testator and others to the town of Riverhead, conveying to the town a strip of land fifty feet wide and three hundred and twenty-six feet in length, for the consideration of \$67.90, "to be used as a highway, with all the privileges thereto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the said parties of the first part therein." The deed contains the usual covenants of warranty. It is claimed by the plaintiff that the words in the deed, "the above granted premises to be used as a highway, with the privileges thereunto belonging, for such purpose only," restrict the operation of the deed so as to make it a grant of easement only in the land, leaving the fee in the grantor. We are of opinion that the deed conveyed the fee of the land, and not an easement, merely, and that the clause restricting the use of the land conveyed for highway purposes operated at most as a condition subsequent. When a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until a breach of condition and a re-entry by the grantor. The

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deed expressly conveys all the estate, title and interest of the grantors in the premises conveyed. The consideration is not nominal. The covenants of seisin or warranty run to the grantee, "his (its) heirs and assigns forever." There are no words limiting the estate conveyed, or which rebut the statutory presumption that the grantors intended to convey all their estate in the land. 1 R. S. 748, § 1. The possibility of reverter merely is not an estate in land, and until the contingency happens the whole title is in the grantee. *Craig v. Wells*, 11 N. Y. 315; *Nicoll v. N. Y. & E. R. Co.*, 12 N. Y. 121; 4 Kent Com. 370; *Kenney v. Wallace*, 24 Hun, 478. Towns are authorized to purchase and hold lands for the use of the inhabitants. 1 R. S. 820. The acquisition by a town, by voluntary grant, of a fee in land for highway purposes is not *ultra vires*. The city of New York, under the act of 1813, is authorized to acquire the fee of lands for streets, but subject to a trust for street purposes, and under the general statute towns are not prohibited from taking a conveyance of a fee for highway purposes, and the power given includes such a conveyance.

We are of opinion that the plaintiff failed to establish title to the land over which the track of the defendant was laid, and the judgment should therefore be reversed and a new trial ordered.

All concur.

Judgment reversed.

NOTE BY THE REPORTER.—In *Robinson v. Railroad Co.*, 59 Vt. 426, the court said: "The first contention is whether the deed from the orator, of February 26, 1858, to the St. Albans and Richford Plank Road Company conveys the fee, or an easement, in the premises described. The language used in the granting part of the deed and in the *habendum* is appropriate, and that commonly used to convey the fee. The first part of the description of the premises, 'being a strip of land four rods in width across my land, and being the same land now occupied by the St. Albans and Richford Plank Road Company, for their road,' is appropriate to an absolute grant; but the remaining clause, 'for the use of a plank-road,' unless properly descriptive of the premises, is such language as would naturally be used to limit or qualify the grant, to change it from a fee to an easement. The description of the premises granted is complete without this clause. This clause in the original deed is separated from the former part of the description by a mark of some kind, designed, evidently, either for a comma or a dash. This clause can have no force as descriptive of the premises conveyed, and no force at all, unless as qualifying and limiting the grant. It is an important rule of construction, applicable to all written instruments, that every word and every clause shall, so far as possible, be given some force and meaning, and that in case, construing the whole instrument one way, meaning is given to every word and clause, while construing

ing it another way some portion of the language used is rendered meaningless, the construction, which gives force and meaning to all the language used, is as a rule to prevail. This is upon the presumption that the party making the instrument did not use any language except what was necessary to make it speak the intention of the parties thereto. Again when it is doubtful what the construction should be, resort to the circumstances surrounding the transaction may be had to enable the reader to understand and apply the language used.

"The language of the deed indicates that the grantee was already in the occupation of the premises granted. The only possible use to which the grantee could put the premises was for its plank-road. Hence it would desire to purchase the right so to use it only. It was also natural that the grantor should desire to limit the grant, it being a strip of land four rods wide through his entire farm. The consideration of the deed, \$40, is quite inadequate for an absolute grant of three acres, so situated as to sever the orator's farm. Under these circumstances we should naturally expect to find an easement rather than a fee granted.

"When language is found in the instrument making the grant, fitted to create the grant naturally to be desired by both parties, although not in the usual form of such a grant, it should be given its evidently intended force and effect. *Keeler v. Wood*, 80 Vt. 248. In making the conveyance a common printed blank deed was used. It was easier to write the limiting clause in the blank space left to be filled with the description of the premises, and at the close of such description, than to erase and insert it in the *habendum*. We think this clause was intended as a limitation upon the grant, reducing it from the grant of the fee to a grant of an easement for the use of a plank-road, all that the grantee cared to acquire, and all that the grantor would be likely to desire to part with."

See *Furnham v. Thompson* (84 Minn. 331), 57 Am. Rep. 59, and note, 63.

PEOPLE V. WEST.

(106 N. Y. 296.)

Constitutional law — furnishing adulterated milk to cheese factory.

A statute making it a misdemeanor to sell or bring adulterated or diluted milk to a butter or cheese factory to be manufactured, is valid.

INDICTMENT for adulterating milk. The opinion states the case.

A. J. Knight, for appellant.

George T. Quinby, for respondent.

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ANDREWS, J. The third section of the act, chapter 183 of the Laws of 1885, entitled "An act to prevent deception in the sale of dairy products and to preserve the public health," supplementary to and in aid of chapter 202 of the Laws of 1884, entitled "An act to prevent deceptions in sales of dairy products," provides, among other things, that "No person or persons shall sell, supply, or bring to be manufactured, to any butter or cheese manufactory, any milk diluted with water, or any unclean, impure, unhealthy, adulterated or unwholesome milk," etc., and declares that whoever violates the provisions of the section shall be guilty of a misdemeanor.

The indictment in this case "accuses the defendant of the crime of watering milk and bringing the same to a manufactory for the purpose of making the same into cheese," and charges "that the said Hanford West, at the town of Sardinia, in the county of Erie, on the eighth day of July, in the year one thousand, eight hundred and eighty-six, did wrongfully, unlawfully and knowingly supply and bring to be manufactured into cheese, to a cheese manufactory then and there situate, a certain quantity of milk, to-wit: ten gallons, which said milk was then and there diluted with water; the said Hanford West then and there bringing the said milk so diluted to the factory for the purpose of having the same manufactured into cheese, contrary to the form of the statute," etc. The defendant demurred to the indictment and the only question presented is, whether the indictment charges a criminal or indictable offense. The indictment follows the language of the statute, and the general rule is well settled that an indictment for a statutory offense, and especially when the offense is a misdemeanor, charging the facts constituting the crime, in the words of the statute, and containing averments as to time, place, person and other circumstances to identify the particular transaction, is good as a pleading and justifies putting the defendant on trial. Whart. Crim. Law, § 364; *People v. Taylor*, 3 Denio, 91. But this rule presupposes that the statute creating the offense is a valid exercise of legislative power. The validity of the statute in question is assailed on the ground that it converts what is or may be an innocent act into a criminal offense, and that it is a restriction upon that natural liberty of every owner of property to use it in any lawful way. The power of the legislature to define and declare public offenses is unlimited except in so far as it is restrained by constitutional pro-

visions and guaranties. A legislative act is presumptively valid, and whoever questions its validity must be able to point to some limitation or restriction, or to some guaranty in the Constitution of the State or the United States which it violates, before its operation can be stayed or the court be called upon to pronounce it void. *Bertholf v. O'Reiley*, 74 N. Y. 509; s. c., 30 Am. Rep. 333. It is not a good objection to a statute prohibiting a particular act and making its commission a public offense that the prohibited act was before the statute lawful or even innocent, and without any element of moral turpitude. It is the province of the legislature to determine in the interests of the public what shall be permitted or forbidden, and the statutes contain very many instances of acts prohibited, the criminality of which consists solely in the fact that they are prohibited, and not at all in their intrinsic quality. The unnecessary multiplication of mere statutory offenses is undoubtedly an evil, and the general interests are best promoted by allowing the largest practicable liberty of individual action, but nevertheless the justice and wisdom of penal legislation, and its extent within constitutional limits, is a matter resting in the judgment of the legislative branch of the government with which courts cannot interfere. The provision in the third section of the act of 1885, now in question, is, we think, a valid exercise of legislative power. The act, as the title indicates, was aimed at the prevention of frauds in dealings in dairy products and the preservation of the public health. The prohibition in the third section against supplying or bringing to any butter or cheese manufactory milk diluted with water, to be manufactured into butter or cheese, does not make a fraudulent intent a necessary ingredient of the crime. It puts upon the person bringing or supplying milk to a butter or cheese manufactory the risk of ascertaining that the milk is pure. It is well known that the system of manufacturing butter and cheese in factories established for the purpose is very common, and this provision of the act of 1885 was doubtless designed for the protection of persons interested in the common enterprise against fraudulent practices, which should unduly enhance the gains of one to the injury of others. This purpose is not in terms expressed in the title of the act or in the section in question. But this was not necessary. The act of mixing water with milk intended for a butter or cheese factory could seldom be committed except for a fraudulent purpose. It is not necessary to the validity of a penal statute that

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the legislature should declare on the face of the statute the policy or purpose for which it was enacted. It is sufficient if it enacts a plain and definite rule not inconsistent with fundamental principles. An inapt or defective title to a criminal statute does not make void a provision not within the exact scope or purpose of the act as expressed therein. We are referred to no constitutional provision in support of the alleged invalidity of the statute in question, except the time-honored and memorable declaration that no person shall be deprived of life, liberty and property without due process of law. The act in question invades neither life, liberty nor property. It destroys no existing property (*Wynehamer v. People*, 13 N. Y. 378); it deprives no one of the right to obtain an honest livelihood (*In re Jacobs*, 98 N. Y. 98; s. c., 50 Am. Rep. 636), and it curtails no one in the exercise of any right except the right to do an act which under ordinary circumstances could only be done with a fraudulent purpose. It is said that the prohibition in the third section extends so far as to make it criminal for a dairyman, owning and conducting a butter or cheese factory for the manufacture of butter and cheese from milk furnished exclusively by himself, to supply the factory with milk from his own cows mixed with water. This would not be a reasonable construction of the act; and if such a supposed state of facts exists in this case it is matter of defense on the trial, and it was not necessary to negative their existence on the face of the indictment. *Com. v. Dana*, 2 Metc. 329, 341; *People v. Walbridge*, 6 Cow. 512, 513; *Fleming v. People*, 27 N. Y. 329. The following authorities tend to sustain the views above expressed on the main question considered. *People v. Cipperly*, 101 N. Y. 634; *People v. Arensberg*, 105 N. Y. 123; s. c., 57 Am. Rep. 748, note; *Phelps v. Racey*, 60 N. Y. 10; s. c., 19 Am. Rep. 140; *Com. v. Waite*, 11 Allen, 264; *Com. v. Evans*, 132 Mass. 11.

We think the judgment is right and should be affirmed.

All concur.

Judgment affirmed.

RAHT V. ATTRILL.

(188 N. Y. 422.)

Receiver — trust mortgage — labor debts — priority.

A hotel company bought mortgaged land, and mortgaged it again in trust to raise money to build. The company became insolvent, and a receiver was appointed, who was authorized by the court to and did borrow money on his certificates to pay employees, and the certificates were declared by the order to be a lien on the land prior to the trust mortgage. On a foreclosure of the original mortgage a surplus arose. *Held*, that the order was void as to the priority provided, although it appeared that the employees had become riotous and threatened to destroy the hotel and other property of the company, unless they were paid.

PROCEEDINGS to obtain surplus moneys in foreclosure. The opinion states the case.

John D. Cadwalader, Clarence D. Ashley, James McNamee and Edward S. Clinch, for appellants.

Lewis Sanders, for respondents.

ANDREWS, J. The scheme set on foot by the principal stockholder, with the consent of a majority of the trustees of the Rockaway Beach Improvement Company, for the administration of its affairs and for the completion, furnishing and operating the hotel through the instrumentality of a receiver appointed by the court, has proved a signal and disastrous failure. The receiver was appointed August 2, 1880, within six months after the organization of the company. Prior to that date the company had expended more than \$350,000, raised on the sale and hypothecation of its bonds, secured by the trust mortgage to Soutter, leaving the hotel building and structures but partially completed, and had exhausted all its available means and was indebted in the sum of nearly \$300,000 for labor, materials and furniture, which it had no means to pay. The receiver, a few days after his appointment, made his first application to borrow money on receiver's certificates, and on the 17th of August an order was made *ex parte* at Special Term, authorizing him to borrow \$130,000 for the "purpose of paying the employees of said company," and to issue

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therefor certificates containing on their face a declaration that the debt represented thereby was "a debt of the receiver incurred for the benefit and protection of the property in his hands, and a first lien thereon prior to the mortgage to William K. Soutter, trustee, for \$700,000, executed April 1, 1880, and to the interest on said mortgage." From time to time thereafter, and up to May, 1881, orders of a similar character were obtained, authorizing the issuing of further certificates for money to "furnish, finish and operate the hotel," also with priority of lien over the Soutter mortgage. Certificates were issued under the various orders, to the amount in all of between \$350,000 and \$400,000, the proceeds of which presumably were used to carry forward the hotel enterprise. In May, 1881, while the Attrill suit, in which the orders were granted, was pending, an action was commenced by the attorney-general to dissolve the corporation. Thereafter, in September, 1881, an action was commenced by Raht, executor, to foreclose the original purchase-money mortgage of \$72,000, which went to a decree April 10, 1882, and under which the hotel property was sold January 31, 1883, making a surplus of \$86,283.39, the distribution of which is the subject of the present controversy. It will be seen from this general statement that the efforts of the receiver to administer the property "for the benefit of all concerned," were terminated after a million dollars had been expended in improving it, in a sale of the whole property of the corporation for a sum of less than \$200,000, and all that is left from the wreck for the payment of creditors, whose aggregate claims exceed \$800,000, is the salvage of \$86,000. The case illustrates what I apprehend has been the common experience where a court, departing from its appropriate judicial function, has undertaken to manage and carry on the business of a failing and insolvent corporation.

The principal controversy is between the mortgage creditors under the Soutter mortgage and the holders of the \$110,000 of certificates issued under the order of August 17, 1880. There is a controversy between the holders of the different classes of certificates. The holders of certificates issued under the orders subsequent to August 17, 1880, insist that they are entitled to share ratably in the surplus with the holders of the certificates first issued, which claim has been adjudicated against them in this action. The question becomes unimportant if it shall be held that

the mortgage creditors have the first lien on the fund in question, as their claims largely exceed the whole surplus.

Except for the provision of the order of August 17, 1880, giving to the certificates issued thereunder priority of lien to the Seutter mortgage, there of course could be no question as to the right of the bondholders to a preference. As between creditors by mortgage and general creditors, the former are entitled to priority of payment out of the mortgaged property by their contract and by law of the land. The law recognizes the validity of contracts of mortgage and enforces them, subject to certain regulations for the protection of subsequent purchasers or incumbrancers. The lien of the mortgage attaches not only to the land in the condition in which it was at the time of the execution of the mortgage, but as changed and improved by accretions, or by labor expended upon it while the mortgage is in existence. Creditors having debts created for money, labor or materials used in improving the mortgaged property, acquire on that account no legal or equitable claim to displace or subordinate the lien of the mortgage for their protection. The order of August 17, 1880, assumes to create a prior equitable lien in favor of the holders of certificates. This is put in the order on the ground that the debt authorized was for the benefit and protection of the property. There are no facts recited in the order, nor were any presented to the court in the affidavit upon which the order was granted, which afford the slightest justification for subverting and postponing the prior legal lien of the mortgage creditors, without their consent, to the debts authorized to be created by the order. The fact that the company was owing debts for labor created no equity for their payment in preference to the bondholders. In view of our decision in the case of *Metropolitan Trust Co. v. Tonawanda Valley and Cuba R. Co.*, 103 N. Y. 245, it is needless to say that however meritorious these claims were, this of itself presented no reason or justification for paying them out of the property of the bondholders by depriving them of the security pledged to them before the labor debts were contracted. The affidavit upon which the order of August 17th was based shows that the company was in serious financial embarrassment, but falls short of disclosing any extraordinary emergency which called for extraordinary methods for the preservation of its property.

But the validity of the order, so far as it assumes to give priority to holders of certificates to be issued thereunder, was sought

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to be supported on the inquiry before the referee in the surplus-money proceedings, on a ground which was not presented to the court when the order was granted. This ground, as stated in the report of the referee, is in substance that a large number of workmen, comprising eight hundred or a thousand men, whose wages, during May, June and July, were in arrears, but who had continued work under promises of payment, all of which had been broken, had reached a state of absolute destitution and in many cases, of starvation, and that at the time the order was made they had stopped working, but remained on the premises and had become riotous in their language and demeanor and threatened, unless paid, to burn the hotel building and erections and personal property therein, and the referee found that but for the action of the bankers who took the certificates and advanced the funds by which the receiver was enabled to pay off the arrears of wages, the hotel and other property of the company "would, in all probability, have been destroyed or seriously injured."

The question presented is, whether these circumstances justified or if presented to the court, would have justified, the order preferring advances made thereunder to the lien of the mortgage. Before coming to this question however it is to be observed that the order was granted in a suit to which neither the trustee of the mortgage nor the bondholders were at the time parties, and without, so far as appears, any notice of the application for the order having been given to them or any of them. The original parties to the suit were Attrill, the principal stockholder of the company, who was plaintiff, and the corporation, the Rockaway Beach Improvement Company, which was sole defendant. On the 13th of August, 1880, an order was made on the application of the receiver, enjoining certain bondholders named from selling or transferring bonds issued under the Soutter mortgage, held by them in pledge, which order was served on the persons and firms named therein. But so far as appears they were not then made parties to the action, and the order was doubtless procured to arrest the apprehended danger of a sacrifice of the bonds by the pledgees, referred to in the complaint. This order gives no intimation of an intention to apply for an order authorizing the issue of receiver's certificates. Soutter, the trustee under the mortgage, was made a party defendant at a subsequent stage of the action, but after the certificates under the order of August 17, were issued and the advances

made. The granting of the order without notice to the mortgagee, or to the bondholders, did not bind them as an adjudication, assuming that the court had jurisdiction to appoint a receiver in the Attrill action, a point which will be assumed without examination. The bondholders, or their trustee, were entitled, by the plainest rules of law and justice, to notice and the right to be heard before their rights under the mortgage could be affected; and it was open to them on the hearing before the referee to contest the order, both on the facts and the law. As was said by BLATCHFORD, J., in *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 456, "the receiver, or those lending money to him or certificates issued on orders made without prior notice to parties interested, take the risk of the final action of the court in regard to the loans."

On the merits we are of opinion that a case was not made out either before the court which granted the order or before the referee on the reference, which within any recognized doctrine regulating or defining the powers of a court of equity in the administration of property through a receiver, justified the order of August 17, postponing the lien of the Soutter mortgage. The power of a court to appoint a receiver, when a proper case is presented, is undoubted. It rests in the sound discretion of the court. The power itself and the object of its exercise were stated long since with admirable clearness by Lord HARDWICKE in *Skip v. Harwood*, 3 Atk. 564: "It is a discretionary power exercised by the court with as great utility to the subject as any authority which belongs to it; and it is provisional only for the more speedy getting of a party's estate and securing it for the benefit of such person who shall appear to be entitled, and it does not at all affect the right." The act of the court in taking charge of property through a receiver is attended with certain necessary expenses of its care and custody; and it has become the settled rule that expenses of realization, and also certain expenses, which are called expenses of preservation, may be incurred under the order of the court on the credit of the property, and it follows from necessity, in order to the effectual administration of the trust assumed by the court, that these expenses should be paid out of the income, or when necessary, out of the *corpus* of the property before distribution, or before the court passes over the property to those adjudged to be entitled. It is claimed that the money advanced in this case to protect the property from an incendiary burning, created a debt for preservation,

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which may be preferred to the claim of the bondholders. We are of a contrary opinion. No doubt a serious emergency existed, growing out of the discontent and riotous disposition of the workmen. But the State primarily assumes the duty of the preservation of public order, and the repression and punishment of crime. It enacts laws, constitutes courts, and commissions officers to this end. It especially makes provision intended to prevent riots, and it seeks to insure prompt action on the part of local officers and communities by imposing upon the latter pecuniary responsibility for injuries to property caused by riotous assemblages. In this case no attempt, so far as appears, was made by the receiver or by the company to secure the intervention of the public authorities to suppress the apprehended disturbance, or to arrest those who threatened to burn the property of the company. It clearly ought not to have been assumed that the ordinary agencies of the law were inadequate to the situation, or that the law, operating through its regularly appointed channels, was impotent to control it. It would be difficult to define by a rule, applicable in every case, what are expenses of preservation which may be incurred by a receiver by authority of the court. It was said by JAMES, L. J., in *Regent's Canal Iron Works Co.*, 3 Ch. Div. 411, 427, that "the only costs for the preservation of the property would be such things as the repairing of the property, paying rates and taxes which would be necessary to prevent any forfeiture, or putting a person in to take care of the property." Wherever the true limit is, we think it does not include the expenditure authorized by the order of August 17, and that such an expenditure is and ought to be excluded from the definition. There must be something approaching a demonstrable necessity to justify such an infringement of the rights of the mortgagees as was attempted in this case.

We have not lost sight of the recent very important cases decided in the Supreme Court of the United States, involving the question of the power which may be vested by the court in receivers of insolvent railroad corporations, and the right of the court to provide for the payment of certain debts contracted before or after the appointment of a receiver out of income, and if that is inadequate, out of the *corpus* of the property. These cases and decisions are the outcome of the growth of railroad enterprises and business within a comparatively recent period. It has been held that under special circumstances the court may direct the payment of ante-

receivership debts for labor or supplies contracted within a limited period before the insolvency, the adjustment and payment of traffic balances in favor of connecting roads, and may direct the receiver to operate the road pending the foreclosure, and to that end purchase necessary rolling stock for the use of the road and make repairs and improvements thereon, the expense of which shall be a charge on the property in priority to legal liens. *Wallace v. Loomis*, 97 U. S. 146; *Foadick v. Schall*, 99 U. S. 235; *Barton v. Barbour*, 104 U. S. 126; *Milttenberger v. Logansport Ry. Co.*, 106 U. S. 286; *Union Trust Co. v. Souther*, 107 U. S. 591; *Burnham v. Bowen*, 111 U. S. 776; *Union Trust Co. v. Ill. Mid. & R. Co.*, *supra*. It cannot be successfully denied that the decisions in these cases vest in the courts a very broad and comprehensive jurisdiction over insolvent railroad corporations and their property. It will be found on examining these cases that the jurisdiction asserted by the court therein is largely based upon the public character of railroad corporations; the public interest in their continued and successful operation; the peculiar character and terms of railroad mortgages, and upon other special grounds not applicable to ordinary private corporations. It was said by WAITE, C. J., in *Foadick v. Schall*, *supra*, that railroad mortgages and the rights of railroad mortgagees are comparatively new in the history of judicial proceedings. They are peculiar in their character and affect peculiar interests;" and in *Barton v. Barbour*, *supra*, that "the new and changed condition of things which is presented by the insolvency of such a corporation as a railroad company has rendered necessary the exercise of large and modified forms of control of its property by the courts charged with the settlement of its affairs and the disposition of its assets." These cases furnish, we think, no authority for upholding the order of August 17 or for subverting the priority of lien, which according to the general rules of law, the bondholders acquired through the trust mortgage on the property of the company. It would be unwise, we think, to extend the power of the court in dealing with property in the hands of receivers to the practical subversion or destruction of vested interests, as would be the case in this instance if the order of August 17 should be sustained. It is best for all that the integrity of contracts should be strictly guarded and maintained and that a rigid, rather than a liberal construction of the power of the court to subject property in the hands of receivers to charges, to the prejudice of creditors, should be adopted.

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There is no ground for alleging an estoppel against the bondholders, barring their right to a review of the action of the court. The claim of estoppel is based upon the assumed fact that the trustee knew that a receiver had been appointed, and did not intervene to prevent the issuing of the certificates. The trustee at the time was not a party to the action, and had no notice of the application for the order, or of the issuing of the certificates until after the advances were made. He was designated as a trustee by the company before the bonds were issued, and was one of the directors and stockholders of the corporation, positions which might bring his duty and interest into conflict. It would be most unjust under the circumstances to conclude the bondholders by his inaction or for the reason that after the advances on the certificates had been made, he, as one of the board of directors and as a stockholder of the company, participated in the action of meetings of directors and stockholders in which the order for the issuing of certificates was approved.

We perceive no valid reason why the expenses incurred by the reorganization committee under the reorganization scheme of 1881, and for which it is claimed a large portion of the bonds and other securities were pledged, may not be adjusted in this proceeding and the lien therefor, if any, be enforced.

It is claimed that in any event there are certain expenses of the receivership chargeable against the fund in court. We do not perceive upon the facts presented that this claim has any foundation. However we think a proper disposition of the appeal will be made by modifying the order of the General Term so as to make the reversal of the order of the Special Term absolute, leaving the parties to apply for a new reference, as they may be advised, on which all questions, except that of priority between the bondholders and creditors holding certificates, may be considered.

All concur.

Ordered accordingly.

DIAMOND MATCH COMPANY V. ROEBER.

(106 N. Y. 473.)

Contract — restraint of trade — general restraint.

The defendant sold his match manufacturing business, with the good will, to a corporation, then engaged in the same business, and covenanted with the purchaser and its assigns not to engage within ninety-nine years in the like business, except for the purchaser, in any of the United States or Territories except Nevada and Montana. *Held*, (1)* valid; (2) that an injunction should be awarded although the defendant, in connection with the covenant, had also executed a bond for liquidated damages; (3) and that the plaintiff, a foreign corporation and assignee of said purchaser, could enforce the agreement.

ACTION for injunction. The opinion states the facts. The plaintiff had judgment below.

Robert Sewell, for appellant.

Noah Davis, for respondent.

ANDREWS, J. Two questions are presented: First. Whether the covenant of the defendant contained in the bill of sale executed by him to the Swift & Courtney & Beecher Company on the 27th day of August, 1880, "that he shall and will not, at any time or times within ninety-nine years, directly or indirectly engage in the manufacture or sale of friction matches (excepting in the capacity of agent or employee of said The Swift & Courtney & Beecher Company), within any of the several States of the United States of America, or in the Territories thereof, or within the District of Columbia, excepting and reserving however the right to manufacture and sell friction matches in the State of Nevada and in the Territory of Montana," is void as being a covenant in restraint of trade; and second, as to the right of the plaintiff, under the special circumstances, to the equitable remedy by injunction to enforce the performance of the covenant. There is no real controversy to the essential facts. The consideration of the covenant was the purchase by the Swift & Courtney & Beecher Company, a Connecticut corporation, of the manufactory No. 528 West Fiftieth street, in the city of New York, belonging to the defendant, in which he had, for several years prior to entering into the covenant, carried on the business of manu-

* See *Washburn v. Doech*, *post*.

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facturing friction matches, and of the stock and materials on hand, together with the trade, trade-marks and good will of the business, for the aggregate sum (excluding a mortgage of \$5,000 on the property, assumed by the company) of \$46,724.05, of which \$13,000 was the price of the real estate. By the preliminary agreement of July 27, 1880, \$28,000 of the purchase-price was to be paid in the stock of the Swift & Courtney & Beecher Company. This was modified when the property was transferred August 27, 1880, by giving to the defendant the option to receive the \$28,000 in the notes of the company or in its stock, the option to be exercised on or before January 1, 1881. The remainder of the purchase-price, \$18,724.05, was paid down in cash, and subsequently, March 1, 1881, the defendant accepted from the plaintiff, the Diamond Match Company, in full payment of the \$28,000, the sum of \$8,000 in cash and notes, and \$20,000 in the stock of the plaintiff, the plaintiff company having, prior to said payment, purchased the property of the Swift & Courtney & Beecher Company, and become the assignee of the defendant's covenant. It is admitted by the pleadings that in August, 1880 (when the covenant in question was made), the Swift & Courtney & Beecher Company carried on the business of manufacturing friction matches in the States of Connecticut, Delaware and Illinois, and of selling the same "in the several States and Territories of the United States and in the District of Columbia;" and the complaint alleges, and the defendant in his answer admits, that he was at the same time also engaged in the manufacture of friction matches in the city of New York, and in selling them in the same territory. The proof tends to support the admission in the pleadings. It was shown that the defendant employed travelling salesmen and that his matches were found in the hands of dealers in ten States. The Swift & Courtney & Beecher Company also sent their matches throughout the country wherever they could find a market. When the bargain was consummated, on the 27th of August, 1880, the defendant entered into the employment of the Swift & Courtney & Beecher Company, and remained in its employment until January, 1881, at a salary of \$1,500 a year. He then entered into the employment of the plaintiff and remained with it during the year 1881, at a salary of \$2,500 a year, and from January 1, 1882, at a salary of \$3,600 a year, when a disagreement arising as to the salary he should thereafter receive, the plaintiff declining to pay a salary of more than \$2,500 a year,

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the defendant voluntarily left its service. Subsequently he became superintendent of a rival match manufacturing company in New Jersey, at a salary of \$5,000, and he also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. The contention by the defendant, that the plaintiff has no equitable remedy to enforce the covenant, rests mainly on the fact that contemporaneously with the execution of the covenant of August 27, 1880, the defendant also executed to the Swift & Courtney & Beecher Company a bond in the penalty of \$15,000, conditioned to pay that sum to the company as liquidated damages in case of a breach of his covenant.

The defendant for his main defense relies upon the ancient doctrine of the common law first definitely declared, so far as I can discover, by Chief Justice PARKER (Lord MACCLESFIELD) in the leading case of *Mitchel v. Reynolds*, 1 P. Wms. 181, and which has been repeated many times by judges in England and America, that a bond in general restraint of trade is void. There are several decisions in the English courts of an earlier date in which the question of the validity of contracts restraining the obligor from pursuing his occupation within a particular locality were considered. The cases are chronologically arranged and stated by Mr. Parsons in his work on Contracts (vol. 2, p. 748, note). The earliest reported case, decided in the time of Henry V, was a suit on a bond given by the defendant, a dyer, not to use his craft within a certain city for the space of half a year. The judge before whom the case came indignantly denounced the plaintiff for procuring such a contract, and turned him out of court. This was followed by cases arising on contracts of a similar character, restraining the obligors from pursuing their trade within a certain place for a certain time, which apparently presented the same question which had been decided in the dyer's case, but the courts sustained the contracts and gave judgment for the plaintiffs; and before the case of *Mitchel v. Reynolds*, it had become settled that an obligation of this character, limited as to time and space, if reasonable under the circumstances and supported by a good consideration, was valid. The case in the Year Books went against all contracts in restraint of trade, whether limited or general. The other cases, prior to *Mitchel v. Reynolds*, sustained contracts for a particular restraint, upon special grounds, and by inference decided against the validity of general restraints. The case of *Mitchel v. Reynolds* was a case of partial restraint

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and the contract was sustained. It is worthy of notice that most, if not all, the English cases which assert the doctrine that all contracts in general restraint of trade are void, were cases where the contract before the court was limited or partial. The same is generally true of the American cases. The principal cases in this State are of that character, and in all of them the particular contract before the court was sustained. *Nobles v. Bates*, 7 Cow. 307; *Chappel v. Brookway*, 21 Wend. 157; *Dunlop v. Gregory*, 10 N. Y. 241; s. c., 61 Am. Dec. 746. In *Alger v. Thacher*, 19 Pick. 51; s. c., 31 Am. Dec. 119, the case was one of general restraint, and the court, construing the rule as inflexible that all contracts in general restraint of trade are void, gave judgment for the defendant. In *Mitchel v. Reynolds* the court, in assigning the reasons for the distinction between a contract in general restraint of trade, and one limited to a particular place, says: "for the former of these must be void, being of no benefit to either party and only oppressive;" and later on, "because in a great many instances they can be of no use to the obligee, which holds in all cases of general restraint throughout England, for what does it signify to a tradesman in London what another does in Newcastle, and surely it would be unreasonable to fix a certain loss on one side without any benefit to the other." He refers to other reasons, viz.: The mischief which may arise (1) to the party, by the loss, by the obligor, of his livelihood and the subsistence of his family; and (2), to the public, by depriving it of a useful member and enabling corporations to gain control of the trade of the kingdom. It is quite obvious that some of these reasons are much less forcible now than when *Mitchel v. Reynolds* was decided. Steam and electricity have, for the purposes of trade and commerce, almost annihilated distance, and the whole world is now a mart for the distribution of the products of industry. The great diffusion of wealth and the restless activity of mankind striving to better their condition, has greatly enlarged the field of human enterprise and created a vast number of new industries, which give scope to ingenuity and employment for capital and labor. The laws no longer favor the granting of exclusive privileges, and to a great extent, business corporations are practically partnerships and may be organized by any persons who desire to unite their capital or skill in business, leaving a free field to all others who desire for the same or similar purposes to clothe themselves with a corporate character. The ten-

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dency of recent adjudications is marked in the direction of relaxing the rigor of the doctrine that all contracts in general restraint of trade are void irrespective of special circumstances. Indeed it has of late been denied that a hard and fast rule of that kind has ever been the law of England. *Rousillon v. Rousillon*, 14 Ch. Div. 351. The law has, for centuries, permitted contracts in partial restraint of trade, when reasonable; and in *Horner v. Graves*, 7 Bing. 735, Chief Justice TINDAL considered a true test to be "whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public." When the restraint is general, but at the same time is co-extensive only with the interest to be protected, and with the benefit meant to be conferred, there seems to be no good reason why, as between the parties, the contract is not as reasonable as when the interest is partial and there is a corresponding partial restraint. And is there any real public interest which necessarily condemns the one and not the other? It is an encouragement to industry and to enterprise in building up a trade, that a man shall be allowed to sell the good will of the business and the fruits of his industry upon the best terms he can obtain. If his business extends over a continent, does public policy forbid his accompanying the sale with a stipulation for restraint co-extensive with the business which he sells? If such a contract is permitted, is the seller any more likely to become a burden on the public than a man who having built up a local trade only sells it, binding himself not to carry it on in the locality? Are the opportunities for employment and for the exercise of useful talents so shut up and hemmed in that the public is likely to lose a useful member of society in the one case and not in the other? Indeed what public policy requires is often a vague and difficult inquiry. It is clear that public policy and the interests of society favor the utmost freedom of contract, within the law, and require that business transactions should not be trammelled by unnecessary restrictions. "If," said Sir GEORGE JESSELL, in *Printing Co. v. Sampson*, L. R., 19 Eq. Cas. 462, "there is one thing more than any other which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that contracts, when entered into freely and voluntarily, shall be held good and shall be enforced by courts of justice." It has sometimes been suggested that the doctrine, that contracts in gen-

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eral restraint of trade are void, is founded in part upon the policy of preventing monopolies, which are opposed to the liberty of the subject, and the granting of which by the king under claim of royal prerogative led to conflicts memorable in English history. But covenants of the character of the one now in question operate simply to prevent the covenantor from engaging in the business which he sells, so as to protect the purchaser in the enjoyment of what he has purchased. To the extent that the contract prevents the vendor from carrying on the particular trade, it deprives the community of any benefit it might derive from his entering into competition. But the business is open to all others, and there is little danger that the public will suffer harm from lack of persons to engage in a profitable industry. Such contracts do not create monopolies. They confer no special or exclusive privilege. If contracts in general restraint of trade, where the trade is general, are void as tending to monopolies, contracts in partial restraint where the trade is local, are subject to the same objection, because they deprive the local community of the services of the covenantor in the particular trade or calling and prevent his becoming a competitor with the covenantee. We are not aware of any rule of law which makes the motive of the covenantee the test of the validity of such a contract. On the contrary we suppose a party may legally purchase the trade and business of another for the very purpose of preventing competition, and the validity of the contract, if supported by a consideration, will depend upon its reasonableness as between the parties. Combinations between producers to limit production and to enhance prices are or may be unlawful, but they stand on a different footing. We cite some of the cases showing the tendency of recent judicial opinion on the general subject. *Whittaker v. Howe*, 3 Beav. 383; *Jones v. Lees*, 1 Hurl. & N. 189; *Rousillon v. Rousillon*, *supra*; *Leather Co. v. Lorrant*, L. R., 9 Eq. Cas. 345; *Collins v. Locke*, 4 App. Cas. 674; *Oregon Steam Co. v. Winsor*, 20 Wall. 64; *Morse v. Morse*, 103 Mass. 73. In *Whittaker v. Howe*, a contract made by a solicitor not to practice as a solicitor "in any part of Great Britain," was held valid. *Rousillon v. Rousillon*, a general contract not to engage in the sale of champagne, without limit as to space, was enforced as being under the circumstances a reasonable contract. *Jones v. Lees*, a covenant by the defendant, a licensee under a patent, that he would not during the license make or sell any slubbing machines without the inven-

tion of the plaintiff applied to them, was held valid. BRAMWELL, J., said: "It is objected that the restraint extends to all England, but so does the privilege." In *Oregon Steam Co. v. Winsor*, the court enforced a covenant by the defendant, made on the purchase of a steamship, that it should not be run or employed in the freight or passenger business upon any waters in the State of California for the period of ten years.

In the present state of the authorities we think it cannot be said that the early doctrine that contracts in general restraint of trade are void, without regard to circumstances, has been abrogated. But it is manifest that it has been much weakened, and that the foundation upon which it was originally placed has, to a considerable extent at least, by the change of circumstances, been removed.

The covenant in the present case is partial and not general. It is practically unlimited as to time, but this under the authorities is not an objection if the contract is otherwise good. *Ward v. Byrne*, 5 M. & W. 548; *Mumford v. Gathing*, 7 C. B. (N. S.) 305, 317. It is limited as to space since it excepts the State of Nevada and the Territory of Montana from its operation, and therefore is a partial and not a general restraint, unless, as claimed by the defendant, the fact that the covenant applies to the whole of the State of New York constitutes a general restraint within the authorities. In *Chappel v. Brockway*, *supra*, BRONSON, J., in stating the general doctrine as to contracts in restraint of trade, remarked that "contracts which go to the total restraint of trade, as that a man will not pursue his occupation anywhere in the State, are void." The contract under consideration in that case was one by which the defendant agreed not to run or be interested in a line of packet boats on the canal between Rochester and Buffalo. The attention of the court was not called to the point whether a contract was partial, which related to a business extending over the whole country, and which restrained the carrying on of business in the State of New York, but excepted other States from its operation. The remark relied upon was *obiter*, and in reason cannot be considered a decision upon the point suggested. We are of the opinion that the contention of the defendant is not sound in principle, and should not be sustained. The boundaries of the States are not those of trade and commerce, and business is restrained within no such limit. The country, as a whole, is that of which we are citizens, and our duty and allegiance are due both to the State and nation. Nor is it true

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as a general rule, that a business established here cannot extend beyond the State, or that it may not be successfully established outside of the State. There are trades and employments which from their nature are localized ; but this is not true of manufacturing industries in general. We are unwilling to say that the doctrine as to what is a general restraint of trade depends upon State lines, and we cannot say that the exception of Nevada and Montana was colorable merely. The rule itself is arbitrary, and we are not disposed to put such a construction upon this contract as will make it a contract in general restraint of trade, when upon its face it is only partial. The case of *Oregon Steam Co. v. Wisnor*, *supra*, supports the view that a restraint is not necessarily general which embraces an entire State. The defendant entered into the covenant as a consideration in part of the purchase of his property by the Swift & Courtney & Beecher Company, presumably because he considered it for his advantage to make the sale. He realized a large sum in money, and on the completion of the transaction became interested as a stockholder in the very business which he had sold. We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.

In respect to the second general question raised, we are of opinion that the equitable jurisdiction of the court to enforce the covenant by injunction was not excluded by the fact that the defendant, in connection with the covenant, executed a bond for its performance, with a stipulation for liquidated damages. It is of course competent for parties to a covenant to agree that a fixed sum shall be paid in case of a breach by the party in default, and that this should be the exclusive remedy. The intention in that case would be manifest that the payment of the penalty should be the price of non-performance, and to be accepted by the covenantee in lieu of performance. *Phoenix Ins. Co. v. Continental Ins. Co.*, 87 N. Y. 400, 405. But the taking of a bond in connection with a covenant does not exclude the jurisdiction of equity in a case otherwise cognizable therein, and the fact that the damages in the bond are liquidated does not change the rule. It is a question of intention, to be deduced from the whole instrument and the circumstances ; and if it appear that the performance of the covenant was intended, and not merely the payment of damages in case of a breach, the covenant will be

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enforced. It was said in *Long v. Bowring*, 33 Beav. 585, which was an action in equity for the specific performance of a covenant, there being also a clause for liquidated damages, "all that is settled by this clause is that if they bring an action for damages the amount to be recovered is £1,000, neither more nor less." There can be no doubt upon the circumstances in this case that the parties intended that the covenant should be performed, and not that the defendant might at his option repurchase his right to manufacture and sell matches on payment of the liquidated damages. The right to relief by injunction in similar contracts is established by numerous cases. *Phoenix Ins. Co. v. Continental Ins. Co.*, *supra*; *Long v. Bowring*, *supra*; *Howard v. Woodward*, 10 Jur. (N. S.) 1123; *Coles v. Sims*, 5 De G., McN. & G. 1; *Avery v. Langford*, Kay's Ch. 663; *Whittaker v. Howe*, *supra*; *Hubbard v. Miller*, 27 Mich. 15.

There are some subordinate questions which will be briefly noticed.

First. The plaintiff, as successor of the Swift & Courtney & Beecher Company, and as assignee of the covenant, can maintain the action. The obligation runs to the Swift & Courtney & Beecher Company, "its successors and assigns." The covenant was in the nature of a property-right and was assignable, at least it was assignable in connection with a sale of the property and business of the assignors. *Hedge v. Lowe*, 47 Iowa, 137, and cases cited. *Second.* The defendant is not in a position which entitles him to raise the question that the contract with the Swift & Courtney & Beecher Company was *ultra vires* the powers of that corporation. He has retained the benefit of the contract and must abide by its terms. *Whitney Arms Co. v. Barlow*, 68 N. Y. 34; s. c., 20 Am. Rep. 504. *Third.* The fact that the plaintiff is a foreign corporation is no objection to its maintaining the action. It would be repugnant to the policy of our legislation and a violation of the rules of comity to grant or withhold relief in our courts upon such a discrimination. *Merrick v. Van Santvoord*, 34 N. Y. 208; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367; s. c., 38 Am. Rep. 518; Code Civ. Pro., § 1779. *Fourth.* The consent of the Swift & Courtney & Beecher Company to the purchase by the defendant of the business of Brueggemann, did not relieve the defendant from his covenant. That transaction was in no way inconsistent therewith. Brueggemann was selling matches manufactured by the company, under an agreement to deal in them exclusively.

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There are some questions on exceptions to the admission and exclusion of evidence. None of them present any question requiring a reversal of the judgment.

There is no error disclosed by the record and the judgment should therefore be affirmed.

Judgment affirmed.

All concur, except PECKHAM, J., dissenting.

NATIONAL FILTERING OIL COMPANY V. CITIZENS' INSURANCE
COMPANY OF MISSOURI.

(106 N. Y. 535.)

Insurance — of royalties — validity — interest.

Defendant executed an insurance policy to plaintiff, reciting that E. & Co., "by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 a month," and covenanting that in case the premises of E. & Co. should be damaged by fire, "so as to cause a diminution of said royalties," defendant would pay the amount of such diminution, during the restoration of said premises to their producing capacity "immediately preceding said fire." The license from the plaintiff to E. & Co. was exclusive. *Held* (1) that the insurance was not limited to the guaranteed amount of royalties, and was valid; (2) that the recovery should not be limited to loss of royalties on oil actually burned, and that evidence was competent to show the amount of royalties paid for two months, immediately before the fire, during the restoration of the works, and for some months next succeeding.

ACTION on a fire insurance policy. The opinion states the case. The plaintiff had judgment below.

G. A. Clement, for appellant.

F. R. Coudert and *Paul Fuller* for respondent.

FINCH, J. The insurance which forms the subject of this litigation was of an unusual character, and presents a question for the solution of which we have no admitted precedent. It was an insurance upon the oil reducing and filtering works of Ellis & Co., and for the protection of specified royalties, payable by that firm to the plaintiff as compensation for an exclusive license to use in

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their business a certain patent which belonged to and was controlled by the plaintiff company. The policy, by its terms, insured that company "on royalties payable to insured from the business of John Ellis & Co., carried on in premises situate in Brooklyn, on block bounded by Sullivan, Walcott and Ferris streets and Buttermilk channel," and then proceeded with a more specific statement, thus: "Whereas, the above-named firm of John Ellis & Co., by virtue of an agreement with the assured, are bound to pay to them royalties for the privilege of using their patent, which royalties are guaranteed to amount to \$250 a month; now therefore the conditions of this insurance are that in case the premises occupied as above by said Ellis & Co. shall be damaged by fire so as to cause a diminution of said royalties, this company will make good to the insured the amount of such diminution during the restoration of said premises to their producing capacity immediately preceding said fire. In case of the destruction by fire of said premises, then this company shall pay the full amount insured." That full amount was \$1,000. Upon the trial the contract with Ellis & Co., referred to in the policy, was read in evidence, under an objection taken by the defendant, and was later withdrawn from the case, the defendant again objecting; but all controversy upon the subject seems to have been terminated by a stipulation of the parties, which permitted the original contract to be used on any appeal with the same force and effect as if printed in the case. It was so used in the General Term, and the appellant's brief treats it as in the case, but insists upon the objection taken to its admissibility. That objection is not well founded. The royalties insured were the product of the contract. They sprang out of that and were measured by it and depended upon it. The parties recognized and acted upon the fact. The policy in terms refers to the contract as the origin and measure of the royalties and recites the stipulations deemed most immediately material. We cannot perfectly understand the risk assumed and the subject insured except by the very reference which the policy made to the contract which created the risk and disclosed and described the royalties. It was properly put in evidence, and we must assume that the recital in the policy and the statement in the opinion of the General Term fairly cover and express its conditions.

We are first to ascertain what loss was insured against. The defendant company contends that the risk it assumed extended no

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further than diminution of royalties below the guaranteed minimum, and since there never was such diminution, that the judgment rendered was erroneous. But such is not the proper construction of the policy. That insured the royalties payable under the contract, not merely the guaranteed proportion, but the royalties stipulated; that is, the whole of them. Up to the minimum amount they depended upon the financial responsibility of Ellis & Co., for to that extent they were payable in any event, and the risk was on the licensees. But beyond that they depended upon the running capacity of the works and the amount of oil they could put upon the market and which could be sold. The phrase "said royalties" in the policy refers to the royalties payable by force of the agreement and to the whole of them, and is not restricted or narrowed by the descriptive statement that they — that is the royalties insured — were guaranteed to be not less than \$250 a month. Whatever they should prove to be they were insured against a diminution caused by fire at the works, and not merely a minimum proportion or guaranteed part of them.

But these royalties, it is argued, were not capable of supporting an insurance, and the policy was a wager policy. It is quite true that beyond the guaranteed minimum they were contingent and dependent upon the condition of the market, and even, possibly, upon the will or choice of Ellis & Co., in the reasonable control of their business. That firm was not bound to pay except upon oil manufactured and sold, and might limit both, or be compelled by the market to limit both to a production yielding no royalties beyond the guaranteed minimum; and so, it is said, the plaintiff had no fixed or definite right to royalties beyond such minimum, no assurance of their existence, no power to compel or demand their being, and could not be said to have lost what it neither had nor had the absolute right to possess. But a further fact in the case establishes more definitely the plaintiff's risk and loss, and the direct causative connection between that loss and the fire which injured the works. The license held by Ellis & Co., to use plaintiff's patent, was an exclusive one, and the earning power of that patent was thus narrowed to the business of Ellis & Co. If the latter did not continue their business, and so preserve the fruitfulness of the patent, by reason of some fault of their own, or from a cause for which they were responsible. the exclusive character of the license ended, and the patentees were at liberty to transfer the right to

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others and thus secure the profits of their invention. But if the business of Ellis & Co. was lessened or restricted because of a fire which should destroy or impair their works, the exclusive right given them was to continue; the patentees could not license others, and must necessarily bear the loss of their diminished royalties. This was the one business risk involved in their contract. Against all others they could provide, but this one they were compelled to bear by the terms of their agreement. Against that risk they insured. It had a direct and necessary connection with the safety of the structures burned. A fire destroying them destroyed the royalties *pro tanto*, because the efficient cause of their loss, and so was established the needed connection between the premises insured and the royalties dependent upon their safety and measuring the loss resulting from their destruction. The policy was therefore not a mere wager, and the royalties could be protected by an insurance against the fire risk which threatened them.

The authorities in this State go far enough in their general principles to cover the case in hand. *Herkimer v. Rice*, 27 N. Y. 163; *Springfield F. & M. Ins. Co. v. Allen*, 43 N. Y. 389; s. c., 3 Am. Rep. 711; *Rohrbach v. Germania Fire Ins. Co.*, 62 N. Y. 47; s. c., 20 Am. Rep. 451. They decide that an interest, legal or equitable, in the property burned, is not necessary to support an insurance upon it; that it is enough if the assured is so situated as to be liable to loss if it be destroyed by the peril insured against; that such an interest in property connected with its safety and situation as will cause the insured to sustain a direct loss from its destruction is an insurable interest; that if there be a right in or against the property which some court will enforce upon the property, a right so closely connected with it and so much dependent for value upon the continued existence of it alone, as that a loss of the property will cause pecuniary damage to the holder of the right against it, he has an insurable interest. The plaintiff brought its case within these principles. A loss measured by the diminution of its royalties, was the inevitable result to it of a fire in the works of Ellis & Co. It could not substitute a new license and must await the repair necessary to a renewal of the business. By its contract it becomes so situated relative to the buildings insured, that it had a direct pecuniary interest in their safety from accidental fire. That interest it could, as it did, insure.

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We are further of opinion that no error was committed in the mode of ascertaining and measuring the loss. The amount of royalties paid for two months immediately preceding the fire was proved, also the amount during the time the works were being restored, and for some months thereafter. It was not confined to royalties upon the amount of oil actually burned. That could have been promptly replaced by Ellis & Co., with perhaps little delay and a very moderate diminution of their volume of business. The bulk of the injury came from the enforced idleness of the works against which under their contract the plaintiff company had no remedy. The amount of loss was established in the only manner possible, and upon sufficient facts for the formation by the jury of a reasonable conclusion. They were not left to a bare guess or speculation.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
SOUTH CAROLINA.

GRAVELEY V. GRAVELEY.

(26 S. C. 1.)

Executor and administrator — foreign will — action for legacy.

Where a testator domiciled in England bequeathed a legacy to a resident of this State, and the executor qualified in England and this State, and paid all debts and all other legacies, and there were sufficient assets in this State to pay this legacy, *held*, that the legatee might maintain an action in this State against the executor to recover the same.

ACTION for a legacy. The opinion states the case. The plaintiff had judgment below.

T. W. Bacot and Lord & Hyde, for plaintiffs.

Simonton & Barker, for executrix.

MCGOWAN, J. This case was once before in this court (see 20 S. C. 99), to which reference is made for a full statement of the facts. It will there be seen that the action was for a legacy with its accumulations of interest given to the plaintiff, John Graveley, by the will of his granduncle, John Graveley, deceased, against Maria Torrens Graveley, the widow of the deceased and the executrix of his will; that the testator, John Graveley, Sr., though born an English subject, had lived many years in the city of Charleston, in this State, where he had married, reared a family, and acquired

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most of his property; but that several years before his death he took his family with him to England, and there, June 27, 1862, executed his will, and on March 31, 1865, died, leaving his will in full force. The executrix qualified on the will in England and also in South Carolina, where a large part of the property still remained, as it had been invested by the testator in his life-time.

By the will the testator gave to his nephew, the plaintiff, who was, and is, a citizen of Charleston, South Carolina, a legacy in the following words: "I give and bequeath two thousand dollars each to John Graveley and Francis Porcher Graveley, the sons of my nephew, Cowlam Graveley, to be held in trust for them by my executors, and paid them, with the accumulations of interest, as they respectively attain the age of twenty-one years," etc. John Graveley, the legatee, attained the age indicated on September 18, 1879, and upon making application for his legacy, was informed that the executrix, in 1873, by the advice of eminent counsel, had laid aside and invested in English three per cent consols such a sum of money as would, on March 31, 1866 (one year after the death of testator), have purchased \$2,000 in legal tender notes of the United States, and added to said consols a further amount, being the interest on said sum at four per cent from March 31, 1866, to date of investment. That the dividends from such invested consols were reinvested by the executrix from time to time in consols producing interest or dividends, and that upon the plaintiff arriving at age, the said alleged investment was sold, and the proceeds, less the English "legacy duty," were offered to plaintiff, if he would sign a receipt in full for the legacy. This the plaintiff refused to do, and claiming \$2,000, with South Carolina interest at seven per cent, payable annually from March 31, 1866, instituted this action to recover the same against Maria Torrens Graveley, as executrix, in the State of South Carolina.

The executrix claimed that the English was the domiciliary administration, and that of South Carolina was only ancillary, and that she could not be sued by a legatee for his legacy in the ancillary jurisdiction, even if the legatee were a citizen of that jurisdiction; and in addition to this defense, on general principles, that this action could not be maintained against her as executrix in any jurisdiction, for the reason that as executrix she had settled the estate in full, and invested the legacy of plaintiff in British consols, and if liable at all, she was only liable in the character of trustee,

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for the said consols, in which the legacy had been invested. In the first judgment in the case this court held that the defendant was not discharged from responsibility for the legacy of the plaintiff by the alleged voluntary *ex parte* investment in English consols, and that she might be sued and the fairness of the alleged investment inquired into "by a proceeding in equity against the executrix as such, in any court where the executrix is amenable to account, in this country or in England." But inasmuch as it did not appear with sufficient clearness whether the domicile of the testator, at the time of his death, was in England or America, or whether at the time the action was brought there were assets of the estate still remaining in this jurisdiction, the court remanded the case, "with leave to the plaintiff, if so advised, to amend his complaint by making proper allegations, so as to make the question of the domicile of the testator at the time of his death, and as to the existence of assets, their character, and amount of the estate of John Graveley in the State of South Carolina when the action was commenced."

Accordingly the case went back, and it being referred without prejudice to Master Sass to report the testimony, he reported on the question of domicile, "that when John Graveley, the testator, left Charleston, in 1859, and returned to England, he did so with the intention of residing permanently in England, his native country, and without any intention of returning to America to reside there; and that he did reside in England from that time until his death, in 1865." And upon the question of assets within the State, he found "that there stood at and before the commencement of this action, and there now stands, in the name of Maria T. Graveley, as executrix of John Graveley, on the books of the State treasurer, State of South Carolina, consol stock to the amount of \$10,000; on the books of the Bank of Charleston, National Banking Association, six shares Bank of Charleston stock (par value \$600); and on the books of the Charleston Gas Light Company, seventy-five shares (par value \$1,875). And that the dividends, interest and income from the foregoing property have been, up to the present time, drawn and received by Maria T. Graveley, as executrix of John Graveley; and also that she, as such executrix, received the insurance money of the buildings on said lot destroyed by fire, as aforesaid, and the purchase-money for said lot," etc.

The cause came up on exceptions to this report, and the Circuit judge held that the domicile of the testator at the time of his death

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was in England ; and that as a consequence, the estate, whether in England or still remaining in South Carolina, must be administered according to the English law. But as it abundantly appeared from the pleadings and facts admitted, that all the debts were paid, and that there are no legacies, either specific or of a general pecuniary character, except the one to be paid to the plaintiff, which are not provided for, and no further account for any purpose whatever is necessary, there could be no good and sufficient reason why the property here should be sent to England only to come back in the shape of a legacy to the plaintiff. And according to this view he proceeded to adjudge the rights of the parties, in obedience however to the English law. In doing so the judge held that the proper construction of the legacy for \$2,000 was that it should be paid in gold or silver coin, or its equivalent, and that this sum together with the English interest of four per cent compounded, was now the true amount of the legacy, which less by the "legacy duty" paid by the executrix, he decreed should be paid to the plaintiff by the defendant, as executrix of the will of the testator, John Graveley, viz., \$3,947.61, each party paying his or her own costs. The judge however dismissed the complaint as to William Watson, who was impleaded as original or substituted trustee under the residuary provision of the will, but denied ever having acted as such trustee ; and also as to Isabella Emma Graveley and Anna Julia Graveley, daughters of, and interested in the residuum with the defendant, Maria Torrens Graveley, with the costs of these defendants to be taxed against the plaintiff.

From this decree both parties appealed. The plaintiff also, because he was charged with the costs of the parties, as to whom the complaint was dismissed.

[Omitting statement of exceptions, and minor questions.]

Third. This brings us to the most important question in the case. That is, the domicile of the testator being in England, and his executrix having qualified on his will both in England and in South Carolina, whether the plaintiff, a citizen of this State, may in the courts of this State sue the executrix and recover a pecuniary legacy, there being ample assets here to pay the same; or whether his prayer for relief here must be refused, the assets transmitted to England, and he required to go there and make his claim in that jurisdiction. As said by Judge STORY in the great case of *Harvey v. Richards*, 1 Mason, 408: "This is a question involving the

doctrines of national comity, or what might be more fitly termed, international law. And looking to it as a question of principle, it would not seem to be attended with any intrinsic difficulty. The property is here, the parties are here, and the rule of distribution is fixed. What reason then exists why the court should not proceed to decree according to the rights of the parties? Why should it send our own citizens to a foreign tribunal to seek that justice which it is in its own power to administer without injustice to any other person? I say without injustice. It may be admitted that a court of equity ought not to be the instrument of injustice, and that if in the given case such would be the effect of its interposition, it ought to withhold its arm."

There is certainly some want of clearness in the authorities as to the liabilities and duties of domiciliary and ancillary administrators, and the precise line of demarcation between them. For the sake of brevity, we may assume several propositions as settled. We take it as settled: 1. That if a testator have personal property in a foreign country, the executor of the domicile has not the right, by virtue of the will alone, to go into that foreign country and possess himself of that property without new letters from the jurisdiction in which the property is found. *Dial v. Gary*, 14 S. C. 573; s. c., 37 Am. Rep. 737. 2. That the new administrator may or may not be the same person as the executor of the domicile. But whether or not, inasmuch as the law of the domicile must control in the succession or distribution of the effects, the administration granted there is deemed the principal or primary one, and that in the foreign country as ancillary, yet there is no privity between them, but they are independent of each other. "Each portion of the estate must be administered in the country in which possession is taken and held under lawful authority." 3 Wms. Exrs., § 1664. 3. That the only mode of reaching such assets is to require their transmission or distribution, after all the claims against the foreign administration have been duly ascertained or settled. "The residue is transmissible to the home administration only when a final account has been settled in the proper tribunal where the new administration is granted, upon the equitable principles adopted by its own law in the application and distribution of the assets found there." Story Conf. Law, § 513; 3 Wms. Exrs. (6th Am. ed.), 1664, and notes.

These points being taken as settled, it is manifest that the question of importance is, as to what claims may be asserted in the

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ancillary jurisdiction before the residuum is ascertained and transmitted. It is conceded on all sides, that the ancillary jurisdiction will not transmit the property found there until all the domestic creditors are provided for. But it is contended that the principle on which the creditors are paid does not embrace domestic legatees, for the reason that they derive their claims from the bounty of the testator and therefore under all circumstances must go to the home administration. We believe it is true that as a rule legatees go to the administration of the domicile, but as it strikes us, not for the reason suggested. Although a legatee is a volunteer, the duty to pay him, if there are assets, is none the less obligatory on that account. But for the reason that there may not be sufficient assets, that his legacy may have to abate to pay debts, and that a general settlement and marshalling of assets may be necessary, it is considered to be safe, convenient and orderly, that as a rule the legatee should go to the home administration.

But there are well-established exceptions to this rule, proceeding as it seems to us, upon the principle that when the general estate has been settled, and there is no need of further account, an exceptional case has arisen, and the reason of the rule ceasing, the rule itself ceases. There are numerous cases in which the ancillary jurisdiction has entertained actions in behalf of citizens, who were mere volunteers. See *Harven v. Richards*, *supra*; *Cureton v. Mills*, 13 S. C. 410, and other cases cited by the Circuit judge. It is not denied that these were cases of mere volunteers, but then another modification is suggested, that in all these cases the parties were distributees or residuary legatees. If the fact be so, why should that make the difference, unless the circumstance of their being residuary was taken as evidence that the estates were already settled and no further account necessary?

If this is the feature which makes residuary legacies exceptional, the one before us — although demonstrative in form — is in character residuary, in the sense that the estate being settled, it is the only liability remaining. The legacy is fixed in amount and there are assets; it must certainly be paid in full, and the only question is, where shall it be paid? Suppose the testator had given to the plaintiff, not \$2,000, but one of his South Carolina State bonds of the denomination of \$2,000, would this court, under the circumstances, be required to transmit that bond to England, really for no other purpose than to make the plaintiff go there to

receive it from the defendant in her character of domiciliary executrix? But without pursuing this, Judge Story, in stating the rule, makes no reference to any such distinctions between residuary and other legacies. He says: "Still however the new administration is made subservient to the rights of creditors, legatees, and distributees, who are resident within the country where it is granted; and the residuum is transmissible * * * only when a final account has been settled in the proper tribunal, where the new administration is granted, upon the equitable principles adopted by its own law in the application of the assets found there." Story Conf. Laws, § 513, and notes.

We cannot say that the Circuit judge erred in holding that "courts of the ancillary jurisdiction have the right to order the payment of a legacy or the distribution of funds to residuary legatees, or under the statute of the domicile, whenever it appears as matter of fact, that there are funds of the estate in the hands of the ancillary jurisdiction; unless it be made to appear that in good faith an accounting is necessary in the jurisdiction of the domicile, or that for some other purpose the equities of the parties require that the funds shall be sent there for distribution."

The judgment of this court is, that the judgment of the Circuit Court be affirmed, except as to the interest chargeable upon the legacy, and that the cause be remanded to the Circuit Court, in order that the exact amount may be ascertained and adjudged according to the conclusions herein announced.

Judgment affirmed and cause remanded.

SITTON v. MACDONALD.

(25 B. C. 62.)

Damages — profits.

In an action for damages for failure to repair an implement, the loss of profits is not a proper element of damages unless the defendant knew the circumstances and contracted with reference to them. (*See note, p. 488.*)

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

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Nix, Shuman & Nix, for appellants.

A. C. Welborn, contra.

MCGOWAN, J. This was an action for damages under the following circumstances: The plaintiff made a business of buying old cotton-ties and manufacturing them into new ties. He alleged that in this business he had occasion to use a peculiar "punch," worth some \$10, which could neither be made nor repaired by an ordinary blacksmith; that this punch getting out of repair, he, in July, 1882, engaged the defendant, who is the proprietor of the "Greenville Machine Works and Iron Foundry," to repair it, which he undertook to do and return it on a given day; that on the day named he called for it, but it had not been repaired; that this occurred several times until the season of 1882 was lost, for which he claimed damages \$350. That the defendant promised to have the punch repaired by July, 1883, but the same disappointments followed, until he lost the season of 1883, for which he claimed damages \$450. The same was repeated until he had lost half the season of 1884, when he purchased another punch and sued the defendant for damages \$1,000. The defendant put in a general denial and special defense "that the cotton-tie punch was broken and useless when left at the shop of defendant.

Upon the trial the plaintiff offered to prove "as damages the amount of profits he would have earned in the ordinary employment of the punch during the time it was detained by the defendant, viz., during the seasons of 1882, 1883 and half of 1884. Defendant objected on the ground that such damages were too speculative, remote and contingent. Objection sustained." The presiding judge then turned to the plaintiff, who was on the stand, and said: "If you can show that you laid in a stock of ties, etc.; if you can prove that you had made contracts to repair ties for others, or to furnish ties when repaired, etc.; if you can prove that hands were employed by the plaintiff, etc., he would be entitled to be reimbursed their wages actually paid." The plaintiff, in accordance with this announcement, testified that "he had laid in about nine (\$9) dollars worth of old ties to manufacture in 1882, from which he would have realized one hundred dollars profit if defendant had repaired his punch according to his promises. He kept this stock on hand until he got his new punch in 1884, after

the commencement of this action, when he manufactured it into new ties, realizing from said nine dollars worth of stock twenty-seven dollars profit." The judge charged the jury that if they believed this testimony, they should find for the plaintiff the difference between the profits he would have made out of the stock of 1882 and the profits he did make out of said stock in 1884; and that it was a question of fact for them to determine whether plaintiff, by his negligence, contributed to the loss thus sustained.

The jury found for the plaintiff \$42. The defendant made a motion for a new trial, and that being refused, he appealed to this court upon the ground "that his honor erred in ruling that plaintiff could offer evidence, and the jury find as damages the difference between the profits made on material manufactured during the fall of 1884, which the plaintiff had on hand in July, 1882, with a view to manufacturing and selling it in that year, but which he did not manufacture and sell in consequence of the alleged breach of contract, and the profits which the plaintiff would have made if he had manufactured and sold such material during the fall of 1882," etc.

We do not understand that this was an action on the case for vindictive damages, for intentional misrepresentation, deceit or fraud, but simply an action for damages for the breach of a contract. The rule as to the proper measure of damages is not always free from difficulty. It is not the same under all circumstances, but necessarily varies to meet the varying cases as they arise. It is different in actions *ex contractu* from those in *tort*. In the former it is more restricted, the fundamental principle being that the damage must be "the primary and immediate result of the breach of contract." Wood's *Mayne Dam.*, § 12; *Tappan v. Harwood*, 2 *Speer*, 536; *D'Orval v. Hunt*, Dudley, 180. In this latter well-considered case it was held that "for the breach of an executory contract, without fraud or imposition, the jury can only give such damages as fairly and naturally result from it, and which can be measured by a pecuniary standard; remote and consequential damages cannot be allowed."

This is undoubtedly the rule, but it is not always easy to fix the exact limit between what is primary and secondary, or what is immediate or consequential and remote. If the breach is merely in the tardy delivery of property intended for sale, it is obvious enough that ordinarily the damage would be the difference in the price

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realized from that which might have been obtained at the proper time. But if the breach is in the non-delivery of an article not intended for sale, but for use in some particular business, other considerations intervene, and the matter is not so clear. In this class of cases the courts have endeavored to lay down certain rules to assist in fixing the damages upon proper principles. In *Hadley v. Baxendale*, 9 Exch. 341, which seems to have been considered a leading case both in England and America, the following rules are indicated: "First, that damages which may fairly and reasonably be considered as naturally arising from a breach of contract, according to the usual course of things, are always recoverable. Second, that the damages which would not arise in the usual course of things from a breach of contract, but which do arise from circumstances peculiar to the special case, are not recoverable, unless the special circumstances are known to the person who has broken the contract." See Wood's *Mayne Dam.*, § 14, and notes.

Now apply these rules to this case. It is not perfectly clear, but possibly the loss of the stock on hand (\$9 worth) rendered valueless for the time by the detention of the punch, might be reasonably considered as naturally arising from a breach of the contract to repair the punch within a certain time. But surely the very remarkable profits which in the opinion of the plaintiff might have been realized from the use of the punch, could not be so considered. It certainly was not "in the usual course of things, but peculiar to the special case," that damages to the extent of hundreds of dollars, should result from delay in repairing a punch entirely out of order, and never worth more than \$10; and if so, according to the second rule above stated, such damages could not be recovered against him, unless these peculiar circumstances were known to the defendant and his contract to repair was made with reference to them, which was not made to appear. In this view, the first ruling of the judge was correct that such possible profits "were too speculative, remote, and contingent."

But subsequent to this general ruling, the plaintiff (who was on the stand) stated that he had on hand stock to the value of \$9, and after he got a new punch in 1884, he worked up that old stock at a profit of \$27; whereas, if he could have used it in 1882, his profit would have been \$100, and the judge then charged that the jury might give the difference as damages. Was this error? We are not able to see how this difference (although arising out of the old stock)

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ceased on that account to be profits. As it seems to us it was still speculative profits, and as such not recoverable as damages. We are aware that there are circumstances under which one who, by a breach of contract, has delayed a sale until there is a fall in the marketable value of the property, may be charged as damages with the difference in price; but we do not see that such principle applies to a case where the only question is as to more or less profits, which as a whole, as profits, are excluded as too contingent, remote, and speculative.

It is the judgment of this court that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

NOTE BY THE REPORTER.—See *Willingham v. Hooen*, 74 Ga. 283; s. c., 58 Am. Rep. 435, saw-mill profits. *Brigham v. Carlisle*, 78 Ala. 243; s. c., 56 Am. Rep. 28, commissions of travelling salesman. *Wakeman v. Wheeler & Wilson Manfg. Co.*, 101 N. Y. 205; s. c., 54 Am. Rep. 676, profits of agents for establishing agencies. *Thomas, etc., Co. v. Wabash, etc., R. Co.*, 63 Wis. 643; s. c., 51 Am. Rep. 725, profits lost by injury of machine by carrier. *Georgia Railroad v. Hayden*, 71 Ga. 518; s. c., 51 Am. Rep. 274, loss of money for tickets sold refunded by theatrical manager detained by negligence of carrier. *Houston, etc., Ry. Co. v. Hill*, 63 Tex. 381; s. c., 51 Am. Rep. 642, same as last case. *Fuller v. Curtis*, 100 Ind. 237; s. c., 50 Am. Rep. 786, loss of profits from use of machine under contract of repair. *City of Chicago v. Huenerbein*, 85 Ill. 594; s. c., 28 Am. Rep. 626, loss of crops from overflowing land. *McKinnon v. McEwan*, 48 Mich. 106; s. c., 42 Am. Rep. 453, breach of contract to build boilers. *Pollock v. Gantt*, 69 Ala. 373; s. c., 44 Am. Rep. 519, wrongful attachment, loss of profits on possible shipments. *Jones v. George*, 56 Tex. 149; s. c., 42 Am. Rep. 689; 61 Tex. 345; s. c., 48 Am. Rep. 280, sale of compound for destroying worms—loss of crops. *Bridges v. Lanham*, 14 Neb. 369; s. c., 45 Am. Rep. 121, prevention of erection of mill. *Fitesimmons v. Chapman*, 87 Mich. 139; s. c., 26 Am. Rep. 508, false representations inducing removal of residence; loss of expected benefits. *Bierbach v. Goodyear Rubber Co.*, 54 Wis. 207; s. c., 41 Am. Rep. 19, personal injuries incapacitating from attending to business. *Howe Machine Co. v. Boyson*, 44 Iowa, 159; 24 Am. Rep. 735, breach of contract to furnish goods to sell. *White v. Miller*, 71 N. Y. 118; s. c., 27 Am. Rep. 13; 78 N. Y. 293; s. c., 34 Am. Rep. 544; *Butler v. Moore*, 68 Ga. 780; s. c., 45 Am. Rep. 508; *Wolcott v. Mount*, 36 N. J. L. 262; s. c., 13 Am. Rep. 433; 38 N. J. L. 496; s. c., 20 Am. Rep. 425; *Van Wyck v. Allen*, 69 N. Y. 1; s. c., 25 Am. Rep. 136; sale of seed, loss of crop.

See note, 42 Am. Rep. 461.

Loss of profits or custom by reason of defective performance of a contract to dress mill-stones, not recoverable. *Fleming v. Beck*, 48 Penn. St. 309. AGNEW, J., said: "A very small part of the machinery of a mill or factory may be so essential to its running, that the want of it will stop operations until this part be mended or replaced, causing a large loss by suspension. But who has ever

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supposed that the blacksmith, mill-wright or mechanic who undertakes to repair or replace it, and whose compensation may be a few dollars or even a few cents, is, by his implied contract to do his work in a workmanlike manner, to be held for the large losses of being idle? But few men could be found to work at a risk so great for a compensation so inadequate. * * * In strict logic it may be said that he who is the cause of loss should be answerable for all the losses which flow from his causation. But in the practical workings of society, the law finds in this, as in a great variety of other matters, that the rule of logic is impracticable and unjust. The general conduct and the reflections of mankind are not founded upon nice casuistry. Things are thought and acted upon rather in a general way, than upon long, laborious, extended and trained investigation. Among the masses of mankind conclusions are generally the results of hasty and partial reflection. Their undertakings therefore must be construed in view of these facts; otherwise they would often be run into a chain of consequences wholly foreign to their intentions. In the ordinary callings and business of life failures are frequent. Few indeed always come up to a proper standard of performance, whether in relation to time, quality, degree or kind. To visit upon them all the consequences of failure would set society on edge, and fill the courts with useless and injurious litigation. It is impossible to compensate for all losses, and the law therefore aims at a just discrimination, which will impose upon the party causing them the proportion of them that a proper view of his acts and the attending circumstances would dictate."

In an action for damages for a wrongful attachment loss of profits or of business may not be considered. *Lowenstein v. Monroe*, 55 Iowa, 83. It was conceded that the rule is otherwise in Alabama, Illinois and Kentucky.

In an action for breach of contract to deliver goods, which the plaintiff had contracted to re-sell, and where the defendant knew the goods were bought for resale, but did not know of this contract, *held*, that the profits of such resale were not recoverable. *Thol v. Henderson*, 8 Q. B. Div. 457.

In an action for breach of a contract of carriage of hay, *held*, that profits of possible sales were not recoverable. *Irvine v. Midland Gt. W. Ry. Co.*, L. R., 6 Ir. 55.

See also *Portland v. Middleton*, 4 C. B. (N. S.) 822, a contract to repair a steam-threshing machine; *Smeed v. Foord*, 1 E. & E. 603, a contract to deliver a threshing machine; *Gee v. Lancashire, etc., Ry. Co.*, 6 H. & N. 211, for delay in carrying cotton to mill; *Great West. Ry. Co. v. Redwayns*, L. R., 1 C. P. 329; *Hales v. Lond. & N. W. Ry. Co.*, 4 B. & S. 66; *Home v. Midland Ry. Co.*, L. R., 8 C. P. 131, for delay in carrying goods; in all of which a recovery for profits lost was denied.

In *Fraser v. Smith*, 60 Ill. 145, an action for breach of contract to repair machinery, prospective gains were held not recoverable, in the absence of proof of outstanding contracts to be performed by the machinery.

So in *Fort v. Orndoff*, 7 Heisk. 167, a breach of contract to repair a dam, whereby the mill lay idle.

In an action for delay in sending a cider-press, loss of custom is not a proper item of damage. *Dennis v. Stoughton*, 55 Vt. 371.

Supposed profits which an agent might have realized from the sale of goods under a contract broken by the principal are speculative and not recoverable. *Union Refining Co. v. Barton*, 77 Ala. 148.

In an action for breach of a contract to put a harvester in order, to enable the owner to cut and bind his grain, loss of crops is not a proper item of damage. *Osborne v. Poket*, 38 Minn. 10.

In an action for deprivation of water-power, profits reasonably to have been anticipated are recoverable. *Crawford v. Parsons*, 63 N. H. 488.

An advertising agent sold to plaintiff space in newspapers to sell again. Held, that defendant was liable for his profits which he would have received from responsible parties to whom he had sold the space. *Hubbard v. Rowell*, 51 Conn. 423.

On breach of a contract for engraving and printing bonds, prospective profits were held recoverable. *Kendall Bank Note Co. v. Sinking Fund Com'rs*, 79 Va. 563.

In *Fairchild v. Rogers*, 32 Minn. 269, the court said: "It may be conceded to be the general rule that loss of profits affords no basis for the awarding of damages for breach of contract, in cases where the profits were to have accrued from some engagement or contract independent of and collateral to the principal contract, for the breach of which the action is brought; that is to say, in cases where the contemplated profits do not either arise naturally, that is, in the usual course of things, from the breach itself, or are not such as may reasonably be supposed to have been contemplated by the parties, when making the contract, as the probable result of the breach. But the reason which governs such cases has no application in a case like that under consideration, where the anticipated profit was to have been realized directly from the contract which these parties are alleged to have made. By the very terms of the contract, the plaintiff, by the performance of it, was to realize the very profit which he claims to have lost by the breach complained of, and for which he now seeks to recover damages. There is no legal reason for denying the right to recover such profits as the parties contemplated as the direct result of the contract. But one seeking a recovery must show by proof both his right to recover, and the measure or extent of the loss or injury for which he demands compensation. It was necessary for the plaintiff to prove that he would have sold the land for a price exceeding \$36,000, within the time fixed by the contract, if his authority had not been terminated. It was not necessary however that the evidence should show this to an absolute certainty. Proof establishing the facts, in the estimation of the jury, to a reasonable degree of certainty, would be sufficient.

"In the cases we have cited, as in this case, the result depended upon facts which were not susceptible of certain, absolute proof; such as the profits which might have accrued from an established mercantile business; what it would have cost to manufacture machinery; to construct salt-vats; to build a bridge; to erect a court-house; to quarry and transport stone during a period of years; to construct a tunnel in the earth; the profit which might have resulted from the cultivation of a farm, or from the manufacture and sale of cloth.

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"A case more precisely like that before us was *Alexander v. Breeden*, 14 R. Monr. 125. The defendant, the owner of real estate, by contract made the plaintiff his agent to sell it for the price of \$2,050. The plaintiff was to have \$50 as his compensation. A purchaser called upon the agent and procured a description of the property, the price, and the name of the owner. He then went to the owner and purchased from him for \$2,000. Plaintiff sued to recover the \$50 agreed upon as his compensation for a sale. The court reviewing the facts proved, considered that there was no positive testimony that the agent could have made the sale for \$2,050, but that the circumstances persuasively showed that he could have done so. A recovery was therefore allowed.

"When the power of this plaintiff to sell was terminated by the sale of the property by the defendant, thirteen days remained of the sixty days during which, as the proof tends to show, plaintiff had an exclusive right to sell. The market value of the property, as appears by all the evidence, exceeded \$36,000, the sum which defendant was to realize from any sale that might be made. Of several witnesses testifying as to values only one places it as low as \$37,500; others make it \$45,000, or more—a sum \$9,000 in excess of the amount which defendant was to receive out of the purchase-price if plaintiff had effected a sale. The evidence tended to show that the land was then rising in value; that the real estate market was active; that property in this vicinity was easily salable for its value; that nearly every piece of property in the vicinity, that was put on the market, was readily sold at that time, and that before the defendant sold the property, the plaintiff had offered it to the same person who became the purchaser. This evidence was such as might have established the fact with reasonable certainty, in the minds of the jury, that the plaintiff would have effected a sale for an amount largely in excess of \$36,000, if his alleged contract right had not been interrupted, and from it the jury would have been warranted in determining upon some certain sum for which, in all probability, a sale would have been made, and which would have determined the amount of the plaintiff's recovery."

In *Pennypacker v. Jones*, 106 Penn. St. 237, for breach of contract to furnish machines to make flour, loss of possible profits was held not a proper item of damage. The court said:

"We agree also that such possible profits are too remote and speculative to constitute a proper measure of damages. Profits may be recovered where they are 'part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is just as clear and plain as to the enjoyment of any other stipulation.' *Hoy v. Grenoble*, 34 Penn. St. 11; *Adams Express Co. v. Egbert*, 36 Penn. St. 384.

"It was no part of this contract that the plaintiffs should make profits, or even have the opportunity of doing so, by carrying on a business with the machinery which the defendants agreed to erect. It is not like the sale of chattels or of land, where the difference between the contract value and the actual or market value of the property sold represents directly and immediately the measure of the party's loss or gain in the transaction. There the possible profit is the very object of the contract, and is necessarily in the contempla-

tion of the parties. But when a machinist furnishes machinery to a mill-owner it is no part of his engagement that a profitable business shall be carried on with the machinery furnished. Of course if it is defective he is responsible for the damage resulting directly from such defect; but that is a very different thing from the uncertain, remote and speculative profits which may or may not be made in the business to be done."

A dentist cannot recover against a carrier, for the loss of a set of dentist's instruments, the profits and earnings he might have made if the loss had not occurred. *Brook v. Gale*, 14 Fla. 533.

In an action for conversion of a mule, the loss of part of the owner's crop cannot be recovered for. *Sledge v. Reid*, 73 N. C. 440.

In an action for breach of agreement to furnish a steamboat for an excursion, the defendant knowing the purpose of the hiring, the loss of the passengers' fares is a legitimate item of damage. *Mace v. Ramsey*, 74 N. C. 11.

In *Frye v. Mains Cent. R. Co.*, 67 Me. 414, the plaintiff, Frye, agreed to run a stage from Dexter to Greenville, for the accommodation of travellers on the defendant's road, and the defendant agreed to give him the exclusive right of ticketing between those points for five years, at a fixed rate. He was contractor for carrying the mails and was express agent between those points. He also owned and ran a steamboat between Greenville and Kineo. In an action for breach of the agreement, that his loss of profits in that steamboat business was not a proper element of damage, the court said:

"If by reason of its connection with the other business in which he was engaged, the plaintiff could transport passengers to and from the defendants' cars without largely increasing his necessary outlay, the legitimate profits of the contract to him were proportionally increased, and the wrongful termination of it by the defendants, which the jury have found, necessarily occasioned to him a greater loss, and the matters to which reference was made by the presiding judge were so obvious in their nature that it cannot but be supposed that both parties entered into the contract with an eye to them as existing facts. The contract did not contemplate the exclusive devotion of the plaintiff's time and property to the transportation of the defendants' passengers, nor would there be any propriety in measuring the plaintiff's profits in the performance of the contract and his consequent loss in being deprived of it by the standard that the defendants claimed to set up. The nature of the contract was such that its terms would inevitably be affected by the other contracts and business to be carried on in connection with it; and the claim that damages for its breach should be estimated 'without reference to any other contracts or any other business' cannot be sustained."

"Whether the contract was such that the plaintiff was entitled to damages for the loss of passengers by his boat from Greenville to Kineo, is a question not so readily answered.

"A majority of the court think, that inasmuch as by its terms the defendants stipulated to give the plaintiff an exclusive right only between Dexter and Greenville, and as he in terms bound himself only to furnish the transportation between these points, no failure on his part, to arrive at or leave Kineo at the prescribed hours or to furnish suitable transportation thither,

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could be imputed to him as a breach of his contract with them, and that it is equally beyond the scope of any legitimate rule of construction to hold that the reference in the contract to the hours of reaching and leaving Kineo carried with it an agreement, on the part of the railroad company, to give the plaintiff the exclusive right of transportation over that part of the route.

"Nor is the majority of the court prepared to hold that the loss between Greenville and Kineo falls within the principles that authorize and regulate the recovery of consequential damages in actions upon contract, or that it can properly be said that it arose according to the usual course of things from the breach of the contract itself, or was such as might reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of a breach of it. They are of the opinion that the profits which the plaintiff might make on that part of the route must be excluded under the rule laid down in *Fox v. Harding*, 7 Cush. 516, 522, as profits accruing from another independent and collateral undertaking, and therefore too uncertain and remote to be taken into consideration as part of the damages occasioned by the breach of the contract in question."

In *Wehle v. Butler*, 61 N. Y. 245, it was held that in an action for conversion of goods of a retail dealer, the fair retail value of the goods may be recovered. The commission of appeals, by REYNOLDS, C., said, "the goods were doubtless purchased with reference to it." But this was overruled by the Court of Appeals in the same case, reported as *Wehle v. Haviland*, 69 N. Y. 448, ALLEN, J., observing:

"There is no controversy as to the measure of damages in actions of this character. It is the actual value of the property at the time of the taking with interest thereon from the time. *Stevens v. Low* 2 Hill, 182; *Kennedy v. Strong*, 14 Johns. 124.

"In some cases where the value of the property is fluctuating, the value may be fixed at the time the owner is deprived of his property, or within such reasonable time thereafter as he might have replaced it. *Romaine v. Van Allen*, 26 N. Y. 809. There are cases in which the highest price up to the time of the trial has been allowed. But these are exceptional cases and do not apply when the value of the property is not subject to fluctuations and the value at the time of the tortious taking and interest will indemnify the owner. The plaintiff was entitled to recover so much as would repair the injury sustained by the wrong-doing of the defendants, and that was the money value of the goods at the time and interest thereon. The money value is the price at which they could be replaced for money in the market, and hence the inquiry is as to the market value of the goods when they have a market value. *Dana v. Fiedler*, 12 N. Y. 41. The sum at which the plaintiff could have replaced the goods in market would have indemnified her for the loss sustained, and the interest upon that sum would have given her the legal profit to which she was entitled, the fixed legal rate of interest taking the place of the uncertain and indefinite profits which the plaintiff might have made either from the possession of the goods or their equivalent in money.

"It is well settled that in actions for the conversion of goods, or for the non-delivery of goods or chattels upon contract, unearned and speculative profits

will not be included as a part of the damages to be recovered. *Blanchard v. Ely*, 21 Wend. 342; s. c., 34 Am. Dec. 250; *Boyd v. Brown*, 17 Pick. 453; *Smith v. Coudry*, 1 How. 28; *Griffin v. Colver*, 16 N. Y. 489; s. c., 79 Am. Dec. 718.

"The retail value or the price at which goods are sold at retail includes the expected and contingent profits, the earning of which involves labor, loss of time and expenses, supposes no damage to or depreciation in the value of the goods, and is dependent upon the contingency of finding purchasers for cash, and not upon credit, within a reasonable time, the sale of the entire stock without the loss by unsalable remnants, and the closing out of a stock of goods as none ever was, or ever will be closed out, by sales at retail at full prices.

"By the allowance of these unearned and uncertain profits, and also the allowance of interest from the time of the conversion the plaintiff recovers the profits which she had hoped to make in the future, and interest upon the profits, as well as upon her investment. The plaintiff was entitled to compensation, and that consisted of the market value of the goods, their cost, or what they would have cost in the market, and interest thereon, and nothing more. The retail profit was not included in the compensation to which she was entitled."

In *Hexter v. Knox*, 63 N. Y. 561, plaintiff leased of defendant a hotel in the city of New York and certain adjoining premises, defendant covenanting to tear down the old building and to erect a new building on the adjoining premises to be used in connection with the hotel, the new building to be completed and plaintiff put in possession by a specified time. Plaintiff was then occupying the hotel and a building upon a portion of the adjoining premises under a former lease. He removed the furniture from the rooms in said building and stored it while the new building was being erected. Defendant failed to complete said new building within the time specified. In an action to recover damages for breach of the covenant, *held*, that plaintiff was entitled to recover the rental value of the use, for hotel purposes, of the rooms in the new building during the time he was deprived of the use thereof by defendant's default, and as to such of the rooms for which plaintiff had the furniture, he was entitled to the value of their use as furnished rooms. The court said:

"The general proposition stated in the charge that the plaintiff was entitled to recover the rental value of the use for hotel purposes of the rooms of which the plaintiff was deprived by the failure of the defendant to perform his covenant, is sustained by the decision of this court in *Myers v. Burns*, 85 N. Y. 269. The part of the new building embraced in the lease was designed to be used in connection with the Prescott House as a part of the hotel. It was contemplated by both parties to the lease that the plaintiff would continue to occupy the Prescott House as a hotel while the new building was being erected, and this was to be completed and the plaintiff was to be put in possession by the time designated. The rent for the whole premises embraced in the lease was to commence with the term, although the plaintiff would necessarily be required to await the erection and completion of the new structure before he could have the beneficial enjoyment of that part of the demised premises. The lease was made with reference to these circumstances, and an allowance to the plaintiff of the rental value of the rooms in the new building

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during the time he was deprived of them by the defendant's default, based upon a consideration of the use to which they were to be applied, and which was contemplated by both parties when the lease was executed, affords to the plaintiff only a just indemnity, and subjects the defendant to no greater liability than it may fairly be supposed he intended to assume when the covenant was made.

"We are of opinion, that within the same principle the jury were properly instructed that the plaintiff was entitled to recover the value of the use of furnished rooms to the extent that the plaintiff was prepared to furnish them with the furniture stored, and intended to be used in the rooms in the new building. The plaintiff by the delay lost as to such rooms their use as furnished rooms. The defendant knew that the plaintiff's furniture had been taken from No. 97 Spring street to enable him to remove the building on that lot, preparatory to erecting the new one, and that the new part was to be occupied by the plaintiff for the same purposes as he had occupied the building from which the furniture was taken. The loss of the use of the furniture from delay in completing the rooms in the new building was the natural result of the failure of the defendant to perform his covenant, and that this loss would occur if the defendant failed to complete the building in time may justly be presumed from the evidence to have been contemplated by the defendant, when the lease was made, as one of the injuries which the plaintiff would sustain from his default, and was properly allowed as part of the damages sustained."

Phillips and Colby Construction Co. v. Seymour, 91 U. S. 648, was an action for breach of contract for building a railroad. The court said: "The attempt was to show that by the use of the road at an earlier day much profit would have resulted. But the witness stated that the road ran through a wild, uninhabited country; that he expected that saw-mills would have been established along the line of the road, and the transportation of lumber incident to the use of such mills would have made the defendant a profit of \$20,000. The whole basis of this calculation is conjectural, uncertain and vague. It is manifestly no safe basis on which it can be assumed that any business would have been done in the few days of the delay; or that if done, it would have been done at a profit. There was nothing on which a jury could have done any thing but conjecture and speculate, at the hazard of sacrificing truth and justice."

In *Simpson v. London, etc., Ry. Co.*, 1 Q. B. Div. 274; 16 Eng. Rep. 880, the plaintiff, a manufacturer, who was in the habit of attending at agricultural shows to exhibit samples of his goods, and made profit by the practice, delivered them upon a show ground where he had been exhibiting them, to the defendant, to be carried by a particular day to a show-ground at another place, where he intended to exhibit them at a show. Nothing was expressly said about this intention. The samples did not arrive till after the stipulated day, and the show was over. Loss of profit was held recoverable. In *Watson v. Amburge Ry. Co.*, 15 Jur. 448, it was left undecided whether the loss by the carrier's delay, of the chance to compete for a prize could be considered. PATTERSON, J., favored, and ERLE, J., opposed a recovery on that ground. In *Adams Ex.*

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Co. v. Egbert, 36 Penn. St. 360, it was held that proof on this point was admissible, but there was no proof authorizing a recovery of such damages. STRONG, J., said: "The company undertook to transport the box to the committee appointed to award the premium. The purpose of the contract was to secure to the plaintiff the privilege of competition. Certainly he must have had that in contemplation, and if the company was informed of the objection of the transmission, the loss of the privilege was in view of both parties at the time they entered into the contract. But whether known or not by the company, the loss was an immediate consequence of the negligent breach." In *Jameson v. Midland Ry. Co.*, 50 L. T. Rep. (N. S.) 426, the goods were marked "Stand 23, Show ground," etc., but attention was not called to the label, nor was the purpose otherwise notified to the carrier. Profits were held recoverable. COLERIDGE, C. J., said, that it could not be contended that if verbal notice of the purpose had been given, and "the parcel had been received in silence, under such circumstances the defendant company would not be liable. The question is whether the notice by the label did amount in substance to such a verbal notice, and it seems to me that it did."

In *Winslow v. Lane*, 63 Me. 161, an action for breach of covenant to use all reasonable and proper diligence in manufacturing and putting on the market a patented invention, there being no proof of loss of profits, it was held that nominal damages only were recoverable. "It is not sufficient that profits might have been made. Such profits are too uncertain and contingent for a basis upon which to rest an estimate of damages."

See *Jones v. Call*, *ante*, 416.

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(25 S. C. 175.)

Criminal law — evidence of good character.

In criminal trials evidence of good character is always to be considered, and its application is not to be limited to doubtful cases.*

CONVICTION of manslaughter. The opinion states the case.

Mitchell & Smith, for appellant.

Solicitor Jervey, contra.

MCGOWAN, J. The defendant was tried at the October term of the court for Berkeley county, for the murder of one James Hutchinson. The principal defense was that the killing was in self-de-

* See *State v. Daley* (53 Vt. 442), 38 Am. Rep. 694.

fense, but he was found guilty of manslaughter, with a recommendation to mercy, and sentenced to five years in the penitentiary. His counsel made a motion for a new trial, and that being refused, he appeals to this court upon the following grounds:

1. "That his honor erred in charging that the good character of the accused was not a fact like all other facts proved in the case, to be weighed and estimated by the jury, but that its value was limited to doubtful cases; whereas he should have charged the jury that the good character of the accused is a fact fit like all other facts proved in the case to be weighed and estimated by the jury, and its value is not to be limited to doubtful cases.

2. "That his honor erred in refusing to grant a new trial, when it appeared that there was an improper and illegal influence brought to bear on one of the jurors, to the prejudice of the defendant, by a constable in charge of the said juror, attending to a call of nature, as set forth in the affidavits of J. R. Magill and George F. Haselden.

3. "That his honor should have granted a new trial, it appearing that an impartial trial was impaired by the clothing of the deceased being carried into the jury room during their deliberations, and examined by them, or some of them, without the order of the court or consent of counsel for the prisoner.

4. "That on the motion for a new trial, his honor erred in excluding from consideration the affidavit of George Coleman, one of the jurors impanelled in the case," etc.

As to the first exception. There was uncontradicted testimony as to the good character of the defendant—that he was not given to seek quarrels, and was "peaceable and quiet." The court was requested to charge, "That the good character of the accused is a fact fit like all other facts proved in the case to be weighed and estimated by the jury, and its value is not to be limited to doubtful cases; on the contrary, it may create a reasonable doubt as to evidence which might otherwise appear conclusive; and such also is the effect of the bad character of the deceased." This request was refused, and instead thereof the court charged as follows: "That request involves the consideration of what appears to be a solecism of law, or rather I should say a paradox. You have heard in every case you have sat upon, that the defendant was entitled to the benefit of every reasonable doubt; now here is a request which says that the good character of the accused is a fact, like all other facts

proved in the case, to be weighed and estimated by the jury, and its value is not to be limited to doubtful cases. The law does limit it to doubtful cases. That is the only class of cases in which good character is available; yet it looks paradoxical to say that a man would need the benefit of a good character in a doubtful case. Now, what does it mean? It is not a paradox when properly understood. Good character is not of any avail as against positive proof. If it were allowed to raise a doubt in the minds of the jury, it would be tantamount to saying to a man, you may go and commit one crime, and your character up to that time being good, the value of that character will raise such a doubt in the minds of the jury that you can be acquitted. That won't do. That would be licensing every one and any one in the community to commit one crime. What does it mean, then? It means this, and I can make it clearer by an illustration than by a definition. * * * Character is valuable in law, valuable in society, it is valuable everywhere, but only in doubtful cases; that is as to the motive with which a thing is done," etc.

Was this error of law on the part of the judge? The law is tender to the life and liberty of the citizen. It declares that no man shall be convicted of crime unless the proof is clear "beyond a reasonable doubt," and certainly when a felony is charged, it also gives the accused the privilege of proving his general good character; that is to say, a character inconsistent with the crime charged. In these rules of evidence we see no necessary paradox; there is between them no conflict or inconsistency, unless we limit the rule as to good character to doubtful cases. In that view it would seem that this rule is at least superfluous, for in a doubtful case the party is entitled to be acquitted under the general rule as to doubt, without any aid from that as to character. But does the law absolutely limit the rule as to good character to doubtful cases? If so, such evidence is made dependent, not on any established principle, but on what may be the facts of a particular case, without having the means of deciding in advance to which category, as being clear or "doubtful," it may belong. As we understand, it is the privilege of the accused, in all cases where character is admissible, to put in evidence his good character without regard to the other proofs in the case, and it is for the jury to consider it in connection with the other evidence, and determine what force and effect it should have.

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It may be true generally that evidence of good character should have more weight in doubtful cases of a particular character, and we think some confusion upon the subject has arisen from this fact; from overlooking the difference between the right and the force to which it may be entitled, and from the practice of explaining to juries that such evidence is most valuable, or only valuable, in such cases. Most certainly the commission of crime must have a beginning, and there is always what may be called the first offense, in which the previous good character, or at least the fact that the accused had never before offended, may be thrown into the scale. But it does not follow that even in such a case proof of character must necessarily result in acquittal. No doubt there are such cases, where the other evidence is so clear as to utterly overwhelm the effect of the proof of character, in which, while good character may be proved, it is also proved beyond doubt that the party committed the offense. As such proof is not expected, and may not outweigh all the other evidence, we can perceive no reason why proof of good character in all cases should not be considered by the jury for what it is worth. It strikes us that it is a mistake to suppose that such rule "would be tantamount to saying to a man that you may go and commit one crime and your character will save you."

In 2 Russell on Crimes, 786, it is said: "Juries have generally been told that when the facts proved are such as to satisfy their minds of the guilt of the party, character however excellent, is no subject for their consideration; but when they entertain any doubt as to the guilt of the party, they may properly turn their attention to the good character which he has received. It is however submitted with deference that the good character of the party accused, satisfactorily established by competent witnesses, is an ingredient which ought always to be submitted to the consideration of the jury, together with the other facts and circumstances of the case. The nature of the charge and the evidence by which it is supported will often render such ingredient of little or no avail; but the more correct course seems to be, not in any case to withdraw it from consideration, but to leave the jury to form their conclusion upon the whole of the evidence, whether an individual, whose character was previously unblemished, has or has not committed the particular crime for which he is called upon to answer." And in a note is cited the case of *Ree v. Stannard*, 32 E. O. L. R. 681, in which PATTERSON, J., said: "I cannot on principle make any dis-

inction between evidence of facts and evidence of character; the latter is equally laid before the jury as the former, as being relevant to the question of guilty or not guilty. The object of laying it before the jury is to induce them to believe, from the improbability that a person of good character should have conducted himself as alleged, that there is some mistake or misrepresentation in the evidence on the part of the prosecution, and it is strictly evidence in the case."

In Wharton's Criminal Evidence, sections 66 and 67 (1884), it is said: "It has been argued by high authorities that good character is of weight only in doubtful cases; but the better opinion is to the contrary. In the first place, it is conceded on all sides that evidence of character, when offered by the defense in criminal cases, is always relevant. Technically therefore it is always material. If immaterial, it should be rejected as irrelevant; but it never can be rejected as irrelevant, therefore it never can be regarded as immaterial. To this it is answered that the court, when admitting it as relevant, does not decide on its materiality, materiality being for the jury; but this virtually concedes that the question is one of logic, and not of law. It makes the weight of evidence as to character dependent, not on any rules arbitrarily pre-assigned, but on the facts of each particular case. It is substantially argued by TALFOURD, J., that it is a *politio principii* to say that evidence as to character is entitled to weight only in doubtful cases, when really it is to make the case doubtful that such evidence is offered. In some instances in which guilt would be otherwise established beyond reasonable doubt, evidence of good character may justly produce an acquittal. But in all cases it is an item of proof to be considered by the jury." See also many cases cited in the notes of Bennett & Heard to 2 Lead. Crim. Cas. 351, and 3 Greenl. Ev., § 25 (1st ed. 13).

This is undoubtedly the rule laid down by elementary works and leading modern authorities, and we have not been able to find any thing in our decided cases which conflicts with it. Only two have been brought to our attention, and they did not decide the precise point made here. *State v. Ford*, reported in a note to *State v. Brown*, 3 Strobb. 526. In this case the prisoner was indicted for stealing slaves. He made no proof of good character, but relied upon the naked presumption of innocence. The Circuit judge stated to the jury that in two cases proof of good character would make the scale preponderate in favor of the prisoner viz., where his guilt

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depended on the legal presumption arising from his possession of the stolen articles, and in a case of doubt. Upon appeal the court said: "This ground is explained in the report (that no evidence of good character was offered). In a criminal case, character, to receive consideration, must be proved. Indeed such proof is the prisoner's privilege. He will be allowed (say the authorities) to call witnesses to speak generally as to his character. If he does not avail himself of this privilege, how can he claim any other benefit from the legal presumption that he is of good character, save that which is afforded to every criminal, that he shall be held to be innocent until his guilt be established to the satisfaction of the court and jury? It is in cases of doubtful facts or to rebut the legal presumption of guilt arising from the possession of stolen articles, that good character proved in court is of most effect. In each there is a possibility of innocence, and proof of good character adds so much more to that possibility, that a conviction would be wrong; but without that proof the prisoner has no advantage from character," etc. This is undoubtedly correct, and we see in it nothing in conflict with the rule as announced by the authorities herein cited.

State v. Edwards, 13 S. C. 30. In this case the parties were indicted for grand larceny. There was proof of the good character of the defendant. The case went off on other grounds, but in commenting on a ground of appeal "that there was error in charging that testimony as to good character can have no weight, except in doubtful cases," the court say: "The charge that good character can have no weight except in doubtful cases might have the effect, under some circumstances, to divert the attention of the jury from the real importance of good character. The bearing of such evidence is directly upon the intent or motive to be ascribed to the conduct of the party, and the proof of good character may have the effect to call for a higher degree of certainty in the proofs of the conduct of the party than would be requisite if a notoriously bad character was shown. If a person of undoubted character is seen in the act of lifting goods from the counter of a store, an intent to steal could not be made out against such proof of character, on testimony that might be abundantly sufficient to convict a notorious thief. While therefore the charge is not in itself necessarily erroneous, it is apparent that it might become so under circumstances easy to conceive. Its bearing in the present case need not be considered, as the case is disposed of on other grounds," etc.

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We think it was misleading and erroneous to charge the jury in general terms that "the law does limit the effect of good character to doubtful cases; and that it is only available in that class of cases."

This makes it unnecessary to consider the other exceptions as to alleged misconduct of some of the jurors and as to the clothes of the prisoner.

The judgment of this court is, that the judgment of the Circuit Court be set aside, and the case remanded in order that there may be a new trial.

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(35 S. C. 228.)

Master and servant — discharge — re-employment.

A master having discharged a servant has no right to recall him on pain of forfeiting all claim for compensation, but if the servant is not otherwise employed he may recall him to do a part of the stipulated work without restoring him to his former position.

ACTION for services. The opinion states the facts. The plaintiff had judgment below.

Smythe & Lee, for appellant.

Lord & Hyde, contra.

SIMPSON, C. J. The plaintiff, respondent, was employed as book-keeper by the defendant, appellant, for the year 1884, to-wit, from December, 1883, to December, 1884, at a salary of \$800 for the year. On May 31, 1884, the defendant dismissed the plaintiff, but in a short time after this dismissal, and before the plaintiff had obtained other employment, the defendant, finding that the books kept by the plaintiff had not been balanced, called upon the plaintiff to do this work, which plaintiff refused to do, except at the rate of \$5 per day, which defendant declined to pay. The plaintiff afterward obtained other employment, and upon the close of the year brought the action below, demanding judgment for \$363, the balance due him for the years' salary after deducting a payment of \$418.37.

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At the trial the defendant was allowed credit for the amount earned by the plaintiff since his discharge, \$120, and also for a small amount due by plaintiff to defendant on the books, \$38.39, which left \$241.63 due plaintiff, for which sum a verdict was rendered in favor of plaintiff. The appeal rests upon the refusal of the presiding judge to charge certain requests, and also upon his charge.

The defendant requested his honor to charge: "That if a servant employed by a master for a stipulated period be discharged by such master before the period expires, even wrongfully, but the master at any time thereafter require him to return to his service, or to perform any of the duties he had agreed to do, he is bound to do so, or else he cannot recover." This his honor refused to charge as too general. He however, in response to the request, charged that if the call upon the servant could fairly admit of the construction that the discharge is recalled, and that the servant is expected to go to work again under the old contract, being restored to his old place, "he had a right to do so. But if he required of him particular work, which he claimed was left undone, that that would not relieve him from his obligations connected with the discharge." The defendant also requested the judge to charge that "a promise to obey the lawful and reasonable orders of the master is implied by law. Any breach of his promise justifies discharge." This his honor also declined, unless the request was qualified by the word "substantial" — in other words, "that it was only a 'substantial' breach of the promise to justify a discharge." The appeal assigns error to the refusal above, and to the response given to the first request above.

We agree with the presiding judge, that the first request was too broad and general in its terms. A master dismissing a servant has no right to recall at any time and under all circumstances after dismissal, on pain of forfeiting all right of recovery. See the case of *Saunders v. Anderson*, 2 Hill, 486, cited by the appellant. In that case, where the general rule, that the master had the right to exact or dispense with any portion of the time of the servant, and capriciously, if he chose, provided he inflicted no injury on the servant, was recognized, yet the court said that this rule must be understood with some qualifications; saying that the planter is not at liberty to drive off and recall at pleasure. If, in consequence of being improperly dismissed, the overseer engage in any other em-

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ployment, he would not be bound to return. This being the law, the Circuit judge did not err in declining the broad request made.

But we think the judge erred in the response which he made to this request. The contract between the parties being an entire contract for the year 1884, the defendant was entitled to plaintiff's services for that period, within the scope of his employment, and as was said in *Saunders v. Anderson, supra*, he had the right to exact from the plaintiff the performance of that service, or to dispense with said service, as he chose, even capriciously, or for any cause, so that he kept within the qualification above suggested. See also *Wood Mast. & Serv.* 269. It appears that the plaintiff, at the time he was called to balance the books, had not been engaged by others, and it was no injury upon him to be recalled to do this work. It was error therefore for the judge to charge that the defendant had no right to recall the plaintiff, unless the plaintiff was to be restored to his former position.

The difference between the second request and the charge is so slight that the error assigned there hardly needs discussion. No doubt, the servant is bound to obey the lawful and reasonable orders of the master, within the scope of the business, and if he refuses to do so, a discharge would be justifiable, and probably no order would be lawful and reasonable, unless at the same time it was substantial, that is, pertained substantially to the business. Mr. Wood says: "The servant is bound to obey all the master's lawful and reasonable commands, even though such commands may, under the circumstances, seem harsh and severe, but the master has a right to manage his own affairs, and it must be a very extreme case in which a servant would be justified in refusing obedience to his orders." *Wood Mast. & Serv.* 224, 225.

The judgment of this court is, that the judgment of the Circuit Court be reversed, and that the case be remanded for a new trial.

Judgment reversed and cause remanded.

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(25 S. C. 348.)

Corporation — several liability of stockholders.

Where the charter of a corporation provides that "each stockholder shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding ten per cent of the par value of the share or shares held by him," a creditor may bring his individual action at law against one of the stockholders, to recover his debt to the extent of ten per cent of the par value of the defendant's shares.

ACTION to enforce stockholder's individual liability. The opinion states the case. The plaintiff had judgment below.

Mitchell & Smith, for appellant.

Smythe & Lee, contra.

McIVER, J. This was an action brought by G. Oliveras Hall, as survivor of W. P. Hall & Co., against the defendant as a stockholder in the Kiawah Phosphate Co., to recover ten per cent of the amount of his stock under one of the provisions of the charter of said company. It appears that the Kiawah Phosphate Co. was formed under the general law authorizing the formation of certain classes of corporations and received its charter from the clerk of the court on January 9, 1882. The capital stock of said company was \$75,000, divided into shares of \$500 each, of which the defendant, at the time of the formation of said company, and ever since, held ten shares. The firm of W. P. Hall & Co. was not a stockholder, but the individuals composing said firm were all stockholders, not however in the same proportions as they were interested in the firm of W. P. Hall & Co. One of these individuals, F. P. Salas, was the president, and another, W. P. Hall, was one of the directors of said company. The firm of W. P. Hall & Co. were duly appointed general agents of said company, and as such were charged with the financial affairs of the company, under the direction of the board of directors. These financial agents were authorized by the board of directors from time to time to borrow money for the use of the company as occasion might require, and under this authority the firm of W. P. Hall & Co. from time to time made large advances to

the Kiawah Phosphate Co., exceeding in the whole the sum of \$50,000.

The operations of the company proving unsuccessful, it was determined to sell out the property and settle up its affairs. Accordingly the property was sold, and after applying the proceeds of the sale to the amount due W. P. Hall & Co., there still remained a very considerable balance due to them. To meet this balance, resort was had to the liability of the stockholders under one of the provisions of the charter, which will hereinafter be set out. At first it was erroneously supposed that this liability was five per cent of the stock held by each stockholder, and after some had settled upon that basis, it was ascertained that the correct amount of the liability was ten instead of five per cent. After this discovery was made, and after some negotiations, the plaintiffs agreed, by way of compromise, to accept five per cent in discharge of the stockholders' liability, provided that amount was paid; otherwise they would claim the ten per cent. Accordingly all the stockholders, except the defendant, paid five per cent, and this still left a balance of over \$4,000 due by the company, for which balance suit was brought by W. P. Hall & Co. against the company and judgment recovered and the execution issued thereon was returned wholly unsatisfied.

After the defendant had been several times offered the privilege of settling his liability at five per cent, as the other stockholders had done, and notified that if he refused to accept this offer, suit would be brought in which ten per cent would be demanded, and after his refusal to accept such offer, this action was commenced. It appeared in evidence from the books of the company that W. P. Hall & Co. were the only creditors of the company, and the testimony also showed that even if all the stockholders had paid ten instead of five per cent of their stock, there would still be a balance due to the plaintiff exceeding the amount now claimed from the defendant.

The case was docketed on calendar No. 1, and upon the call of that calendar a motion was made by the defendant to transfer the case to calendar No. 2, upon the ground "that it was properly a case in equity, to which all the creditors and all the stockholders should be parties." The Circuit judge refused the motion, holding that "the provisions of law applicable to the charter involved in this case differ from those of every other decided case which I have been able to examine on same subject. They seem clearly to intend

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that every stockholder, to the extent of his liability, is subject to an action at law by any creditor who after due effort has failed to collect his debt from the company."

A jury having been waived, the case was tried by the court, when Judge PRESSLY, after hearing the evidence and the argument, rendered judgment in favor of the plaintiffs, saying: "The debt and insolvency of the company are proved. Plaintiff is sole creditor, and defendant is the only stockholder who has not settled his liability. The only serious issue of fact in the case is whether plaintiff's debt was payable within a year from the time it was contracted. It was payable on call; the company had the right to pay, and the creditor the right to demand payment at pleasure — that I regard as a debt payable within the year."

From this judgment defendant appeals upon the several grounds set out in the records, which raise the following questions: 1st. Can this action be maintained at law, or is the remedy in equity alone where all the creditors and all the stockholders can be made parties? 2d. Was the debt due plaintiffs payable within a year? 3d. Does the stockholders' liability, under the charter, attach in favor of officers or co-stockholders in the company? 4th. Can the defendant be made liable for more than five per cent of his stock?

As is said by Mr. Chief Justice WAITE in *Terry v. Little*, 101 U. S. 217: "The individual liability of stockholders in a corporation is always a creature of statute. It does not exist at common law. The first thing to be determined in all such cases is therefore what liability has been created. There will always be difficulty in attempting to reconcile cases of this class in which the general question of remedy has arisen, unless special attention is given to the precise language of the statute under consideration * * * Undoubtedly, under the provisions of some charters, suits at law may be maintained by one creditor against one or more of the stockholders. The form and extent of a statutory liability of this kind depend upon the particular phraseology of the statute which creates the liability."

To determine therefore the first question presented by the grounds of appeal, we must look to the particular phraseology of the statute creating the liability in this case. That statute is now incorporated in the General Statutes as section 1362, and so much of it as relates to the questions here involved reads as follows: "Each stockholder in the said corporation shall be jointly and

severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding ten per cent, of the par value of the share or shares held by him at the time the demand of the creditor was created, provided, that such demand shall have been payable within one year." Now, in the particular phraseology here used several things are observable. The language is each stockholder — not the stockholders generally; the liability is joint and several, not joint only; the amount of the liability is a fixed and definite sum, not proportionate to the amount of debts due or the liability of others. In fixing the time to which reference must be had to ascertain the amount of the liability of each stockholder, we find the singular and not the plural number used — ten per cent, of the par value of the shares "held by him at the time the demand of the creditor was created." And finally in the proviso the singular and not the plural number is again used: "Provided that such demand shall have been payable within one year."

From this analysis of the language of the section it seems clear that where there is a creditor of a corporation holding an unsatisfied demand against it, which was payable within one year, a several liability is fixed upon each stockholder to pay such demand to the extent of ten per cent of the par value of the shares held by him at the time such demand was created. Such liability rests upon contract, implied from the acceptance of a charter containing such provision, *Sullivan v. Sullivan Manufacturing Co.*, 14 S. C. 494; 20 S. C. 79; *Flash v. Conn.*, 109 U. S. 371, and presents a clear case for enforcement by an action at law. The fact that under this construction of the statute it is barely possible that a single stockholder might be required to pay the total balance due by an insolvent corporation, after exhausting all of its assets, cannot affect the question. Our inquiry is limited to what is the proper construction of the language used by the legislature, and we have no power or disposition to question the policy of any of its acts. The question for us to determine is, what is the remedy given to a creditor of a corporation against the stockholders by the act in question? If the remedy given operates harshly or inequitably as between the stockholders themselves, it is for them and not the creditors to invoke the aid of that tribunal which has the power to adjust the equities amongst themselves. *Ogilvie v. Knox Ins. Co.*, 22 How. 380.

So too the fact that under the construction which we have adopted, it is possible that one creditor may acquire an advantage

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over another by promptness of action, does not strike us as entitled to much if any consideration. It will be observed that the section of the act which we are called upon to construe, unlike many others which were designed to fix an individual liability upon the stockholders of a corporation for the protection of its creditors, contains no language indicating a purpose that the liability of the stockholders shall constitute a common fund to be applied to the payment of the creditors in proportion to the amount of their several demands. On the contrary, it fixes a liability to a definite, specified amount upon each stockholder to pay the demand of any creditor which shall have been payable within a year. It is therefore like the ordinary case of several creditors having demands against the same person, where usually the prompt and vigilant acquire an advantage over the dilatory and indifferent.

As has already been said, it is not to be expected that the various cases on this subject can be reconciled, because the phraseology used in the several charters which have been brought under review differ materially in declaring the liability of stockholders and directors or trustees of a corporation. Hence we do not think that the cases mainly relied upon by the appellant are applicable. For example, in *Pollard v. Bailey*, 20 Wall. 520, the language of the charter was: "Individual stockholders, having shares in said bank, shall be bound respectively for all the debts of the bank in proportion to their stock holden therein;" and the fact that the provision was for a proportionate liability, and not for a fixed sum, was held to be sufficient to show that such a liability could only be enforced by a proceeding in equity, to which all the creditors and all the stockholders should be made parties, so as to enable the court to determine the proportionate liability of each stockholder. But in that very case the distinction between a provision for a proportionate liability, and one in which no such feature appears, was expressly recognized by the chief justice in delivering the opinion of the court, for he says: "The case is different from what it would be if the charter had provided generally that all stockholders should be individually liable for the payment of the debts." How much more pointed would the distinction be if the charter provided, as in the case now under consideration, that each stockholder should be severally as well as jointly liable to the creditors for ten per cent (a fixed and definite sum) of the par value of the

shares held by him at the time the demand of the creditor was created; provided such demand was payable within a year.

So in *Terry v. Tubman*, 92 U. S. 156, the provision of the charter was for a proportionate liability and the remarks just made will dispose of that case. But in addition to this, it may be observed that the point was not raised in *Terry v. Tubman*; but the justice who delivered the opinion of the court simply remarked that under the case of *Pollard v. Bailey*, *supra*, the proper proceeding was in equity. In *Hornor v. Henning*, 93 U. S. 288, the provision of the charter was that "if the indebtedness of any company organized under this act shall at any time exceed the amount of its capital stock, the trustees of such company assenting thereto shall be personally and individually liable for such excess to the creditors of the company." So that there the liability was not for any fixed and definite sum, but for whatever amount the debts might be found to exceed the capital stock; and it was held that the true construction of the act was that the trustees who assented to such an increase of indebtedness beyond the amount of the capital stock were to be held guilty of a breach of trust, for which they were accountable to the creditors. Of course, such a liability could only be enforced by a proceeding in equity, and the case was again distinguished from those cases in which it had been held that an action at law might be maintained against a single stockholder by a single creditor; for there the liability of the stockholder, under the statute, is several and is limited to the amount of his stock, a fixed sum easily ascertained. It is very manifest therefore that the case of *Hornor v. Henning* is not applicable to the case now under consideration.

In *Stone v. Chisolm*, 113 U. S. 302, the provision of the charter was as follows: "The total amount of debts which such corporation shall at any time owe shall not exceed the amount of its capital stock actually paid in; and in case of excess, the directors, in whose administration it shall happen, shall be personally liable for the same, both to the contractor or contractors and to the corporation." The question was whether under this charter a single creditor could maintain an action at law against one or more directors, or whether such creditor must proceed by a creditor's bill in equity. The court held that the case could not be distinguished from *Hornor v. Henning*, and that the proper proceeding was in equity. We do not see therefore how the case of *Stone v. Chisolm* can be regarded as sustaining the view contended for by appellant.

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On the other hand, the case of *Flash v. Conn.*, 109 U. S. 371, cited by the counsel for respondents, seems to us more in point. The language of the charter there brought under review was as follows: "All the stockholders of every company incorporated under this act shall be severally, individually, liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section." Now although this language is not so strong as that used in the charter now under consideration, yet the court held that a single creditor could under that charter maintain an action at law against a single stockholder.

In delivering the opinion of the court, Mr. Justice WOODS uses this language: "Lastly, it is objected that the declaration sets out a case which should have been prosecuted in equity, and not at law. There is no ground for this objection to rest on. In the cases of *Pollard v. Bailey*, 20 Wall. 520; *Terry v. Tubman*, 92 U. S. 156, to which we are referred in its support, the liability of the stockholders was in proportion to the stock held by them. Each stockholder was therefore only liable for his proportion of the debts. This proportion could only be ascertained upon an account of the debts and stock, and a *pro rata* distribution of the indebtedness among the several stockholders. This the court held could only be done by a suit in equity. But in this case the statute makes every stockholder individually liable for the debts of the company for an amount equal to the amount of his stock. This liability is fixed, and does not depend on the liability of other stockholders. There is no necessity for bringing in other stockholders or creditors. Any creditor who has recovered judgment against the company and sued out an execution thereon, which has been returned unsatisfied, may sue any stockholder, and no other creditor can."

It seems to us that the intention of the legislature, as derived from the language used in the charter now under review, was to protect the interest of creditors, and not stockholders, of the corporation, by affording the former a cheap and expeditious mode of enforcing the payment of their debts, thus insuring, as far as practicable, the utmost good faith and the most prudent management on the part of those interested in corporations which by virtue of

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associated capital, energy and brains, necessarily acquire large advantages over the individual citizen. If the liability secured by this act could only be enforced by a proceeding in equity, oftentimes tedious and expensive, it would amount to a practical denial of the security intended to be afforded, in many cases, for creditors holding small demands would be deterred, by the expense and delay which they would have to encounter, from availing themselves of the remedy provided. We think therefore that there was no error on the part of the Circuit judge in holding that an action at law could be maintained in this case.

[Minor points omitted.]

The judgment of this court is, that the judgment of the Circuit Court be affirmed.

Judgment affirmed.

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(25 S. C. 324.)

Lunatic — liability of committee for his services.

A committee of a lunatic is bound to account for the value of services rendered by his ward to him, unless the service is required only for proper discipline and for health.

THE opinion states the case.

Robert Aldrich and S. W. Melton, for appellants.

John J. Maher and Isaac M. Hutson, contra.

SIMPSON, C. J. In a former appeal in this case, involving the judgment of the Circuit Court, sustaining a demurrer to the complaint, this court, reversing the judgment below in that respect, decided that the order in chancery, dated in 1855, by which the testator of the defendants had been appointed the committee of William Ashley, the younger, and under which he was allowed the annual interest on the estate of the said William for his board and maintenance, did not in itself preclude a claim for compensation, on behalf of the said William, for services rendered said committee, after the relation of committee and ward had been established, if in fact the said William had rendered to his committee services of a

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character and under such circumstances as would entitle him in law to such compensation. The court further held in substance that while it was almost inconceivable that an incurable lunatic could earn wages by his labor, yet that this was a matter which would depend upon the facts of each case, and if in any case wages had been justly earned by valuable services rendered by such lunatic, and exacted for the profit of the committee, that the doors of the court should not be shut against him because of his lunacy, and that in such case, where an action like the one below had been brought claiming an accounting from the estate of said committee, it could not be dismissed on the ground that the complaint did not state facts sufficient to constitute a cause of action. And the case was then remanded to the Circuit Court under the above rulings.

Upon the case going back it was heard and tried by his honor, Judge FRASER (upon a mass of testimony taken by the master, all of which appears in the "case"), who found the following facts: First. "That said lunatic did render valuable services to his father (the committee) during the whole time the relation of ward and committee existed between them." Second. "That said services were such as were usually done by inferior laborers, scarcely half hands, and therefore worth half wages, to-wit: \$100." Third. "That it was probably true, that William Ashley, the elder, never dreamed that he was making himself liable to account for these services." And fourth. That said services were enforced by the committee, not so much for the discipline and health of the ward, as for the reason that the father (committee) "had become accustomed to his son's infirmities and gave way to his own ruling passion, to economize and utilize all available labor about him." In other words, as we understand this last finding, that the services of the ward were enforced for the profit of the committee, benefit to the ward being merely incidental. Upon these facts, his honor held that the estate of the committee should account, saying that he was not so sure but that it should still account even if said services had been enforced as a matter of discipline and healthful exercise only. Whereupon he ordered and adjudged that the defendants, executors of William Ashley, the elder (former committee), do pay the plaintiff, present committee, the sum of \$5,050, and the costs of suit.

The appeal questions the correctness of his honor's findings of fact, denying upon the evidence the capacity of the lunatic to ren-

der service, that he rendered service of the value fixed by the judge, and also that said services were enforced for the profit of the committee, under the influence of a ruling passion to economize and utilize all available labor about him, instead of for the proper discipline of said lunatic—the appellants contending that the service rendered by the son was enforced by the father chiefly from a desire to promote the health and happiness of said son, said services having no real value to the father, because otherwise what was done by him would have been done by his regularly employed servants and the “trash gang” without additional expense to the father, and that his honor should have so found.

The appeal also questions the principle of law which his honor applied to the facts as found, to-wit: that although no contract, either express or implied, in the sense that both parties should assent thereto, could arise, one of the parties being *non compos* and therefore unable to assent, yet that a legal obligation independent of contract could and did exist here, arising out of the duty of the committee to charge himself with the value of the services received by him at the hands of his ward, upon which the action could be sustained—the appellant contending besides, that the service rendered here was rendered in the relation of parent and child, not for the benefit of the parent, and with no intention, expectation or promise, express or implied, on the part of the parent to pay for them, and therefore it should have been held gratuitous and not susceptible of raising a charge.

[Omitting a review of facts.]

Now the question arises, whether under the facts before this court, the judgment below can be affirmed? This raises the legal question, when and under what circumstances can a lunatic earn wages, chargeable upon his committee? * * *

We have examined, as far as practicable, all text-books and reported cases within our reach, and singular to say, while we have found the law to be that a *non compos* may be held liable to others for services of a certain character, to-wit, necessities furnished, medical attention, etc., on the ground of an implied contract, notwithstanding his admitted incapacity to make a contract, yet we have found no case where others were held liable to him for services rendered. Nor have the distinguished and zealous counsel in the cause referred us to any case where the precise question here has ever before been presented to the courts. Coming in this shape,

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then before us, it has been exceedingly embarrassing, and its decision either way has been surrounded with difficulties, and especially so on account of the possible influence which the decision one way or the other may have upon the happiness of that unfortunate class of persons in the behalf of one of whom in the person of William Ashley, the younger, this question for the first time in the history of our judiciary has been raised.

To lay down the rule that a committee can work his afflicted ward constantly, indiscriminately, and for his own pecuniary profit, and yet pay him nothing, nor account in any way to his estate, because he cannot make a contract, would be a principle not only dangerous to this stricken class, but shocking to every sense of justice. And yet on the other hand, to hold that a committee is to be held to a strict account and made to pay for every service rendered by his ward, as if no such relation as that of committee and ward existed, and without regard to the object had in view by the committee in requiring the service, and that too after the lapse of years, during all of which time the committee had never conceived that he was imposing upon himself such an obligation, as in this case, would be dangerous to the committee, and besides would in a great degree destroy the purposes of his guardianship, preventing the exercise of proper discretion in the discipline and control which should be administered, and the plan which he should adopt in the government of his ward.

In the absence of direct authority and with no case before us where the question here has been considered and discussed, we are left to general principles as applied in analogous cases, and we do not see why the principle enforced against a lunatic for necessary services rendered him should not be applied in his favor, where he has rendered necessary service to another. Nor why his committee should not be responsible where the evidence is plain that he has enforced and accepted such service for his own benefit and profit. The laborer is worthy of his hire, and if one having control of a *non compos* who is unable to contract, yet able to do valuable work, enforces that labor for his own benefit, he should not escape responsibility. If however the service has been enforced by the committee not for his profit, but for the proper discipline and healthful exercise and employment of the ward, as the best thing to be done for his comfort and happiness, although with incidental benefit to the committee, we see no ground for accountability, and especially

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so in a case like the one at bar, where the committee was the father of the ward, was a man of large fortune, in no way in need of the service rendered, had no idea that he was annually creating a debt against himself, which was to be enforced against his estate after his death, when he would have no opportunity to meet the claim by explanation, counter-claim or otherwise, and when too, although he bequeathed nothing directly to his said son, he yet charged his whole estate with his comfortable support and maintenance.

Our conclusion is, that while the Circuit judge was not in error as to the principle of law which he applied to the facts as found by him, yet one of those facts being overruled, and that fact being the one which made the law enforced applicable, the judgment becomes erroneous.

It is therefore the judgment of this court that the judgment of the Circuit Court be reversed. *Judgment reversed.*

COLEMAN V. WILMINGTON, COLUMBIA AND AUGUSTA RAILROAD COMPANY.

(25 S. C. 442.)

Master and servant — fellow-servants — conductor and laborer.

A conductor of a material train is not a fellow-servant with a laborer on the train, even in adjusting a switch.*

ACTION for personal injuries by negligence. The opinion states the facts. The plaintiff had judgment below.

J. H. Ryon, for appellant.

Bowman & Harby, contra.

McGOWAN, J. Paul Coleman, a laborer in the service of the defendant company, brought this action against said company for damages on account of personal injuries received by him in the discharge of his duty, on April 23, 1885, at Eastover, in Richland county. It appeared that Coleman was a laborer on a material

* In *Boatwright v. Rylr. Co.*, 25 S. C. 128, it was held that the engineer and a coupler of a freight train are fellow-servants, but the conductor and the brakeman and coupler are not.

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train of which J. W. Griffin was the conductor; that after their day's work on the day stated, the train was run to the station at Eastover, and arriving there a little after sundown, the conductor, Griffin, had the switch turned so as to connect with a side track at that place, and ran the train on said track in order to spend the night. The laborers remained in the shanty of the material train, and about two hours after the regular passenger train, in passing, ran on the side track and into collision with the material train, by which one man was killed, and Coleman, the plaintiff, had his left foot and leg crushed. The negligence alleged was in allowing the switch to remain in connection with the turn-out instead of the main line.

The defendant company denied negligence, and for a second defense, stated specifically, that at Eastover they had a side track connected with the main line by a railroad switch, and that said switch was in good order and condition; that on the day mentioned they moved a train of cars upon the side track and caused it to stop thereon; that they disconnected the said side track from the main line and carefully locked the switch, and that thereafter said switch was unfastened by some evil disposed person to them unknown, and the main line was thereby broken, and a train running on the main line was turned into the side track and unavoidably collided with the material train standing thereon, without any fault or negligence on their part, etc.

The conductor, Griffin, testified positively that after going in upon the side track he turned the switch and restored the connection with main line and locked it. There was proof however tending to show that a collision on the same side track, very much in the same way, had occurred in August of the preceding year, and that the result of an investigation, ordered on that occasion, was to acquit the officials and to restore them to their places, there being grounds to believe that the lock of the switch, found unbroken, must have been tampered with, picked, or unlocked with a false key, in the possession of some malicious person, unknown to and beyond the control of the officers of the company; that notwithstanding this incident, the company had never changed the lock, but continued to use the same until after the last collision, in which the plaintiff was injured. The change of one lock would have made it necessary to change all on the road of the same pattern.

Upon the close of the plaintiff's testimony the counsel of the defendant company moved for a nonsuit on two grounds: First,

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that the testimony for the plaintiff disclosed the fact that the injury to him resulted from an accident, caused either by the malicious act of some third person, over whom the defendant had no control; or second, from the negligence of a fellow-servant of the plaintiff. The motion was refused and the trial proceeded. Both parties made requests to charge. Some were charged as presented and others modified and some refused. The matters complained of appear in the exceptions. Upon the charge of the judge the jury found a verdict of \$1,500 for the plaintiff, and the defendant appeals upon the following exceptions:

[Omitting the others.]

“For that his honor refused the defendant’s motion for a nonsuit, made on the ground that the testimony for the plaintiff disclosed the fact that the injury to him resulted from an accident caused either by the malicious act of some third person over whom the defendant had no control, or from the negligence of a fellow-servant of the plaintiff.”

As to the last exception (9), complaining of error in refusing the nonsuit. It is very clear that at eight o’clock, two hours after the material train had passed out upon the side track, the switch connected with the side track and caused the collision. That connection was established to let in the material train, and must either have remained open, or if then closed, must in some way have been changed in the meantime. In the view that Griffin, the conductor, may have left the switch open after using it, the argument was made that although clear negligence on his part, it was the negligence of a fellow-servant, for which the company is not responsible to the plaintiff; that in reference to the special duty of the conductor to restore the switch to its place in connection with the main line, he was not a “middleman,” representing the company, but a mere “switchman,” doing the duty of “a mere operative.”

We do not clearly see the distinction suggested. Taking the rule to be as stated by Mr. Wood, in his work on Master and Servant, section 438, it seems to us that the adjustment of the switches was an important duty resting on the company, no matter to whom the performance of that duty was delegated. Mr. Wood says: “To formulate a rule from these cases, it would be as follows: whenever the master delegates to another the performance of a duty to his servants, which the master has impliedly contracted to perform in

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person, or which rests upon him as an absolute duty, he is liable for the manner in which that duty is performed by the middleman whom he has selected as his agent, and to the extent of the discharge of those duties by the middleman he stands in the place of the master, but as to all other matters he is a mere co-servant.

In the late case of *Calvo v. Railroad Co.*, 23 S. C. 528; s. c., 55 Am. Rep. 28, this court held that a locomotive engineer and a section master of track-workers are not fellow-servants in the sense that a railroad company employing them would not be liable to one for damages resulting to him from the negligence of the other. In delivering the judgment of the court, Mr. Justice McIVER said: "Now it is well settled that it is the duty of the master, not only to provide his servants in the first instance with suitable and safe machinery and other appliances to do the work for which they are employed, but also to keep the same in proper repair; and any negligence in the performance of such duty, whether done by the master in person or by subordinate agents selected by him for the purpose, would render the master liable for any injury sustained by one of his servants by reason of such negligence. * * * The question is as to the nature of the duty, not as to the rank or grade of the person employed to perform it. Is it a duty which the master owes to his servants? Under the well-settled rule above mentioned, we think that nothing can be clearer than that it is the duty of a railroad company to provide a suitable and safe track over which its locomotive engineers and other servants of that class are required to run its trains, and that negligence on the part of those to whom it commits such duty is the negligence of the company," etc.

If it is the duty of the company to provide a suitable and safe track, of which there is no doubt whatever, it is most assuredly no less its duty to keep in order and rightly placed the switches, which are certainly important parts of the track, and probably needing more strict attention than any other. We do not think that the conductor, Griffin, in respect to the special duty of readjusting the switch, was a fellow-servant of the plaintiff in the sense of the rule relied on. See *Couch v. C. C. & A. R. Co.*, 22 S. C. 557.

[Omitting minor points.]

The judgment of this court is, the judgment of the Circuit Court is affirmed.

Judgment affirmed.

SOUTH CAROLINA,

Hendrix v. Seaborn.

HENDRIX V. SEABORN.

(35 S. C. 481.)

Homestead — "alienation" — will.

A provision by will that the testator's property, consisting exclusively of personalty, should be sold and applied to the payment of his debts, is not such an "alienation" as will defeat the widow's claim to an exemption under the homestead laws

CLAIM of exemption under homestead act. The opinion states the case. The claim was disallowed below.

Wells, Orr, Thompson & Jaynes, for appellant.

Murray & Shelor, contra.

McGOWAN, J. Elias Hendrix died in November, 1884, possessed of a small personal estate and owing comparatively a considerable amount of debts. He left a widow and child as his family, and a will by which he provided as follows, viz., that all his property should be sold and the proceeds applied, first, to the payment of his debts; second, a bequest of \$200 to Lula Owens, a young girl whom he had raised; and third, the residue, if any, to go to his widow, Matilda Hendrix. James Seaborn, the defendant, was named as executor, and he qualified as such.

The widow, Matilda, applied to the master, Richard Lewis, Esq., claiming the homestead exemption of \$500, notwithstanding the will of her deceased husband, and the master, after taking testimony, made an order assigning her the constitutional exemption in the property of her deceased husband. The defendant, executor, excepted to the homestead set off by the commissioners under his order and appealed to the Circuit Court. The exceptions were heard by Judge PRESSLEY, who reversed the order of the master allowing the plaintiff homestead in the personal property of her deceased husband, contrary to the provisions of his will, and set aside the same. From this order the plaintiff appeals to this court upon the following exceptions:

"I. Because his honor erred in his conclusion of law that the testamentary disposition of property by a debtor would defeat his

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widow's right to homestead exemption in his property against his creditors.

"II. Because his honor erred in refusing to confirm the order of Richard Lewis, master, assigning exemption in the personalty of Elias Hendrix, deceased, to his widow, Matilda.

"III. Because his honor erred in directing the executor to wind up the estate of his testator according to the provisions of his will, when the estate is insolvent and his widow entitled to homestead exemption against his debts.

"IV. Because the creditors of the testator do not become legatees under his will, and the estate being insolvent, the homestead exemption defeats the payment of the debts, and his honor should have so held.

"V. Because the husband under the law has no right to direct by a testamentary disposition after his death that his widow cannot claim homestead exemption against his debts, and it should have been so held by his honor.

"VI. Because the right of homestead, secured by the Constitution and the acts in pursuance thereof, is not an estate, but a mere exemption; hence the only effect of an assignment of homestead is to ascertain and designate what particular property is covered by such exemption, so that the same cannot be applied to the payment of debts, and thus the homestead laws do not affect the statute of distribution nor the right of the owner to dispose of the same as he may see fit.

"VII. Because the title to property is not changed by its being designated as a homestead for the family of one deceased, but such property remains subject to the payment of debts, the application to their payment to be made at the time of the death of the person entitled to such exemption, and said property also remains subject to the provisions of a will after the constitutional exemption has been enjoyed.

"VIII. Because the assignment of homestead in this case could have no other effect than to designate and set apart certain property of testator as exempt from his debts during the life of the widow, leaving the title to such property just where it was before, and leaving the property so designated as exempt, subject to the payment of his debts and to distribution at the death of Matilda Hendrix, according to the provisions of the will of testator; and his honor should have so held," etc.

The legacy to Lula Owens being a voluntary gift, cannot stand in the way of creditors, and therefore the only question in the case is, whether the widow is entitled to the exemption of \$500, as against the debts of the testator, to which he directed it to be paid by his will.

The Constitution, as amended in 1880, declares : " That the general assembly shall enact such laws as will exempt from attachment and sale, under any mesne or final process issued from any court, to the head of any family residing in this State, a homestead in lands, whether held in fee or any lesser estate; * * * and every head of a family residing in this State, whether entitled to a homestead exemption in lands or not, personal property not to exceed in value the sum of five hundred dollars," etc. In order to carry this provision into effect, the general assembly has passed laws directing as to the manner in which the debtor may claim his homestead exemption, and have the same set off to him, and in addition has made the following provision : " If the husband be dead, the wife or children; if the father and mother be dead, the children living on the homestead, etc., shall be entitled to have the family homestead exempted in like manner as if the husband or parents were living," etc. " No waiver of the right of homestead, however solemn made by the head of the family, at any time prior to the assignment of homestead, shall defeat the homestead provided for by this chapter, provided however that no right of homestead shall exist or be allowed in any property, real or personal, aliened or mortgaged, by any person or persons whomsoever, as against the title or claim of the alienee or mortgagee, or his, her or their heirs or assigns." Gen. Stat., §§ 1997, 1998.

There is no doubt that the testator, Hendrix, in his life-time might have claimed the exemption ; but not having done so, and had it actually assigned, he, as owner, had the right to alien or mortgage it so as to exclude his widow from claiming it after his death. See *Homestead Association v. Enslow*, 7 S. C. 19; *Smith v. Mallone*, 10 S. C. 40, and subsequent cases. He did not however, while living, execute a mortgage of his property to secure his creditors, but he left a will by which he directed that his property should be sold and the proceeds applied to the payment of his debts ; and the question is, whether that testamentary disposition was such an " alienation " of his property in the sense of the act as to exclude the widow's right to the exemption after his death.

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The question is one of construction as to the intent of the legislature.

It is true that, speaking in general terms, a disposition by will may be embraced in the word "alienation," used in a generic sense, as being one of the many ways in which it may be effected. But it seems to us that the accurate and specific meaning of the word is to pass an estate from one to another, involving the idea of a perfected conveyance of title *inter vivos*. Alienation has been defined to be "the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law." 2 Bouv. L. Dict. In conformity with this definition, our court has held that a mortgage not passing the title, but being a mere security for the debt, is not an alienation under the statute, 3 and 4 W. & M., chap. 14, Gen. Stat., § 1952. See *Simons v. Bryce*, 10 S. C. 354; *Smith v. Grant*, 15 S. C. 150; *Warren v. Raymond*, 17 S. C. 178.

The provisions of the homestead law, in the circumstances authorizing the exemption, are general in their character specifying the cases in which the exemption is excluded, viz., alienation and mortgage by the debtor. These are clearly exceptions to a general rule, and therefore are not to be extended or enlarged by implication. It is to be assumed that if other exceptions, such as a legacy or devise, had been intended, they would have been added to the list. The point raised here has never before arisen in this State, but the great industry and research of the appellant's counsel have enabled him to cite numerous cases from the reports of other States to the point that no instrument, conveyance, incumbrance, lien, or charge, can affect the right to claim homestead, except such as are expressly mentioned in the enactment, constitutional or statutory, creating the exemption. It seems that in homestead cases, especially as to the causes of exclusion, there is a strict application of the maxim, *expressio unius est exclusio alterius*. See Pott. Dwarries, 321, where it is said: "An exception strengthens the force of law in cases not excepted; so, according to Lord Bacon, enumeration weakens it in cases not enumerated."

But in addition to this, while the husband is undoubtedly the absolute owner of his property, so far as concerns the right of alienation, it is manifest that in regard to homestead the provisions of the law above cited, taken together, limit that right and create something like an interest for life in the husband, with limitation over

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to the wife and children; that is to say, the husband has the right to claim the exemption during his life; but if he does not avail himself of that right, it is at his death transmitted to his wife and children. Looking at it in this light, the difficulty does not lie in the fact that a testamentary provision cannot be carried into effect until after the death of the testator; for as to mortgages, it often happens that they are not foreclosed, and may not even fall due until after the death of the mortgagor. But as to its being an alienation, the great trouble lies further back, and has reference to the time when the testamentary provision really comes into existence; whether a charge by will, which is ambulatory and does not take effect until after the death of the testator, can be said to be "an alienation" in the life-time of the testator. The will may have been prepared and executed long before, but it was inchoate, and gave no rights whatever, until the death of the testator, which was the precise moment at which the husband's right of homestead ceased to exist and was transmitted to his wife and children. Under these circumstances, can it be said that the charge in favor of the creditors came into existence in the life-time of the testator, or did it not in fact become effectual after the husband's right for life had terminated, being an attempt to reach beyond and control the matter after his death? And if so, which right should be preferred, that of creditors or the homestead right of the widow?

It seems to us, in respect to this right of homestead exemption, the husband debtor is in a condition somewhat analogous to that of the first taker in a fee conditional after issue born. He has the right in his life-time to alien by deed, but it is well settled that a devise by him is not an alienation within the meaning of the law. "If such an alienation do not take effect in the life-time of the testator, the estate must descend to the heirs of limitation *per formam doni*." *Jones v. Postell*, Harper, 92. In delivering the judgment of the court in this case, Chancellor JOHNSON said: "Alienation may be effected by devise; and when this question was first presented to my mind, its strong inclination was, that as one of the means it was embraced in the power given to the tenant of a conditional fee to alien on the birth of issue; but I am satisfied, on a more attentive consideration, that its meaning was intended to be restricted to alienation by deed. It will be recollected, that if the devisee had died without having been divested of the estate by some of the means authorized by law, it would have descended to the heirs of his

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body, and the devise would have taken effect *per formam doni*. It is also clear that the devise could not take effect until after the death of the testator, so that the rights of the issue and the devisee devolved on them both at the same instant, and the question is, which of them is to be preferred? * * It is impossible to mistake the application of the principle, if we compare this estate with one held in joint tenancy, to which it has been made to apply. These estates, though different in the manner of their creation and duration and some of their properties, with respect to the powers which the tenants have over them, are strikingly analogous. A joint tenant, like a tenant of a conditional fee, may alien, forfeit, etc. (Co. Lit. 180a), and by this means defeat the *jus accrescendi*; and yet Littleton says, that if one joint tenant, by testament, devise lands held in joint tenancy, the devise is void; and the reason given is, that 'no devise can take effect till after the death of the devisor, and all the lands presently cometh by the law to his companion who surviveth,' etc. See *Burnett v. Burnett*, 17 S. C. 552.

We see no reason why the same principle should not apply here. No bequest can take effect until after the death of the testator, and all the personal property to the extent of the homestead exemption "presently cometh by the law to the widow of testator who surviveth." Mr. Thompson, in his work on "Homestead and Exemptions," section 544, says: "The right thus secured to the widow and orphan children of the owner of a homestead, would in some cases be rendered nugatory, if he could deprive them of it by testamentary provision. The existence of such a right in them is clearly incompatible with the existence of such a power over it by him. And in this respect it seems to make no difference whether the widow takes a plenary title by descent, as in Vermont, or by survivorship, as in California, or whether she takes a mere right of occupancy during the continuance of certain contingencies, as in most of the States," etc. See also *Smythe Homest. Exemp.*, § 541; *Brettun v. Fox*, 100 Mass. 234; 10 Ill. 263.

We agree with the counsel for the respondent, that it is creditable in a debtor to make provision for the payment of his debts, and that no unnecessary impediments should be thrown in the way of such good purpose. But it is the duty of the court simply to administer the law as they understand it. And as it seems to us the very existence of the homestead laws shows that in a proper case it is the policy of the law to favor the right of homestead exemption

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especially that of the widow and children, against the creditors of the deceased husband.

The judgment of this court is, that the judgment of the Circuit Court be reversed and the case remanded for such further proceedings as may be necessary to carry out the conclusions herein announced.

Judgment reversed and cause remanded.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

PIKE V. BRITTON.

(71 Cal. 188.)

Landlord and tenant—liability of landlord for negligence of janitor—overflow of water.

The landlord of a building is liable for injury to the goods of a sub-tenant by water which the janitor in the employ of the landlord negligently permitted to escape from a wash-basin in the building.

ACTION for injury to goods by negligence. Appeal from order granting plaintiff a new trial. The opinion states the case.

W. H. L. Barnes, for appellant.

R. Thompson, for respondents.

BELOHER, C. J. This is an appeal from an order granting the plaintiffs a new trial. The motion was made on the minutes of the court, and the case comes here on the judgment-roll, without statement or bill of exceptions. The action was brought to recover damages, and the facts, as they are disclosed by the record, are as follows: The defendant owned a building which was situate on California street, in the city and county of San Francisco, and was three stories high. The plaintiffs were sub-lessees of a room on the ground-floor, and had stored in the room a stock of goods, wares and merchandise. Above the room occupied by the plaintiffs was

a room occupied by a tenant of the defendant, and above that a room occupied by the janitor of the building, who was in the employment and under the control of the defendant. In each of these upper rooms the defendant had placed a wash-basin, to which for the purpose of bringing water to it, a pipe extended from the water main in the street, and from which a waste and overflow pipe led off to the sewer in the street. In the supply-pipe was a stop-cock to turn the water on and off, and for the waste-pipe was a plug, to be used in holding the water in, and then letting it out of the basin. The supply-pipes for both basins were so large that when the stop-cocks were turned so as to allow full heads of water to run, the basins would fill up and overflow in less than a minute of time, though the waste and overflow pipes were unobstructed and free. On the 28th of November, 1878, the basin in the room next above that occupied by the plaintiffs overflowed, and the water ran down and damaged the plaintiffs' goods. Again on the fifth of December following, the basin in the room occupied by the janitor overflowed, and the water ran down and did more damage to the plaintiffs' goods. These overflows were caused by the stop-cocks being carelessly and negligently left open by the occupants of the rooms in which the basins were placed.

The court found: "11. That the said first-mentioned overflow came from room number 9, in said building, then occupied by Mr. Niece, and that this overflow did the larger part of the said damage, but not all. 12. That the said second overflow came from a room in said building occupied at the time by the janitor of said building, and that the said janitor was then in the employ of said defendant. 13. That the said second overflow was caused by the basin-cock being negligently and carelessly left open when the water was turned off in the building, and the plug in the bottom of the basin was left in by the said janitor, thereby causing an overflow when the water was again turned on for the use of said building. 14. That the said fixtures placed in said building by the defendant were at that time reasonable, suitable, and safe for the purpose for which they were constructed, if used with proper and reasonable care. 15. That the injury sustained by the plaintiffs was caused by the negligent and careless use of said fixtures by some person or persons other than the defendant, and over whom defendant had no authority or control, and who turned on the water into said basin or basins, and carelessly and negligently omitted to turn off

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the said water, and permitted the same to flow, without shutting off the same when its use was no longer necessary."

Upon the findings, judgment was rendered in favor of the defendant. The new trial appears to have been granted, because the findings were conflicting, and did not support the judgment. It may be admitted, as claimed for the appellant, that a landlord is not liable to one tenant for injuries caused by the negligence of another tenant, but still that does not meet the whole case. "If the injury result from the negligence of the owner, either in constructing or upholding the freehold, he is responsible, but is not in general, responsible for the negligence of the tenant in the use of it." *Eakin v. Brown*, 1 E. D. Smith, 44.

Without seeing the testimony, we are unable to say whether the defendant can be held liable for the damage caused by the first overflow, but we think it clear that he is liable for so much of the damage as was caused by the second overflow. "A master is responsible to third persons for the negligence of his servants in the course of their employment as such, to the same extent as if the act were his own." *Shearm. and Redf. Neg.*, § 59. The janitor whose negligence caused the second overflow was the servant of the defendant, and his negligence was in the course of his employment. The conclusion of the court therefore, that the defendant was not liable at all, was unauthorized by the facts, and the new trial was properly granted.

The order should be affirmed.

SEARLS and FOOTE, CO., concurred.

THE COURT.—For the reasons given in the foregoing opinion, the order is affirmed.

Order affirmed.

MITCHELL V. CLARKE.

(71 Cal. 168.)

Damages — remote.

In an action of damages for breach of contract to pay to a creditor of the plaintiff money intrusted to the defendant by the plaintiff therefor, evidence is not admissible to show that the creditor sued the plaintiff therefor, and attached his property and sacrificed it as perishable, unless the defendant had knowledge of special circumstances showing that he contracted with reference to such an emergency.*

* See *Wallace v. Ah Sam*, *post*, and note, *ante*, 488.

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

Tyler & Tyler, for appellant.

Henry E. Highton, for respondent.

McKINSTREY, J. In *Hadley v. Bazendale*, 9 Exch. 341, it was laid down that the damages which one party to a contract ought to receive in respect to a breach of it by another are such as arise "naturally," that is, in the usual course of things—from the breach itself, or such as may reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach. The doctrine of that case has since been followed, and is said by Lord CAMPBELL to accord with the Code Napoleon, with Pothier, and "with all the authorities." *Smeed v. Flood*, 1 El. & E. 612. When reference is made to the terms of the contract alone, there is ordinarily little difficulty in determining what damages arise from its breach in the usual course of things, and the parties will be presumed to have contemplated such damages only. But where it is claimed the circumstances show that a special purpose was intended to be accomplished by one of the parties (a failure to accomplish which by means of the contract would cause him greater damage than would ordinarily follow from a breach by the other party), and such purpose was known to the other party, the facts showing the special purpose and the knowledge of the other party must be averred. This rule has frequently been applied to the breach of a contract for the sale of goods to be delivered at a certain time. In such cases the general rule of damages is fixed by reference to the market value of the goods at the time they were to have been delivered, because in the usual course of events the purchaser could have supplied himself with like commodities at the market price. And if special circumstances existed entitling the purchaser to greater damages for the defeat of a special purpose known to the contracting parties (as for example, if the purchaser had already contracted to furnish the goods at a profit, and they could not be obtained in the market), such circumstances must be stated in the declaration with the facts, which under the circumstances enhanced the injury. 1 Suth. Dam. 764.

Here the plaintiff placed in the hands of the defendant a certain sum of money, to be paid when it should become due from the

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plaintiff to a third person with whom plaintiff had contracted. The consequence which would follow, in the usual course, from a failure of the defendant to pay the money, would be that plaintiff would be obliged himself to pay his creditor. If the plaintiff was insolvent when he intrusted defendant with the money, and the circumstances — known to defendant — were such as that the sacrifice of plaintiff's only property would probably follow from defendant's neglect to pay the money to Jackson, it might be argued that such sacrifice and consequent greater damages than would usually flow from a breach of a like contract were in the contemplation of defendant as well as of plaintiff when their contract was entered into. We express no opinion whether the complaint herein may be amended, or in what particulars; nor do we express any opinion as to what injuries may be proved in case of any supposed amendment, as flowing naturally and directly from facts which may be alleged in the complaint as amended and established by evidence. It is enough to say, that under the present complaint, evidence with respect to the action brought by Jackson against plaintiff, the attachment of his property, its sale as perishable, and the consequent loss, was not admissible.

The complaint herein alleges no facts showing it was known to defendant that damages would probably flow from a breach of the contract by him greater than such as would follow from a breach of the contract "in the usual course of things." The averment that the defendant knew that the plaintiff "fully and exclusively" relied on the defendant to pay \$1,500, as he agreed to pay it, is but an averment of that which would be implied from the contract. "Parties when they enter into contracts may well be presumed to contemplate the ordinary and natural incidents and consequences of performance or non-performance; but they are not supposed to know the conditions of each other's affairs, nor to take into consideration any existing or contemplated transactions not communicated nor known with other persons. Few persons would enter into contracts of any considerable extent, as to subject-matter or time, if they should thereby incidentally assume the responsibility of carrying them out, or be held legally affected by other arrangements over which they have no control, and the existence of which is unknown to them." 1 Suth. Dam. 77.

In *Hadley v. Baxendale*, *supra*, ALDERSON, B., said: "Now if the special circumstances under which the contract was actually

made were communicated by the plaintiffs to defendant, and thus known to both parties, the damages resulting from a breach of such contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at most could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances from such a breach of contract." In *Hadley v. Baxendale* the declaration averred the special circumstances, but the plaintiff failed to prove that they were communicated to the defendant. The court said: "The only circumstances communicated by the plaintiffs to the defendants were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of the mill."

The cases cited in which bankers or others had refused to pay drafts drawn on them by one having sufficient moneys in their hands, or where they had specially agreed to provide for the drafts, are cases in which the distinction between "general" and "special" damages was recognized.

Under a general allegation of damages a plaintiff may prove and recover those damages which naturally and necessarily result from the act complained of. These damages, the law implies, will proceed from the act, although the amount may often be in the reasonable discretion of the jury. They are called "general," as contradistinguished from "special," damages, which are required to be specially stated in the declaration.

It was intimated by Lord TENTERDEN in *Marzetti v. Williams*, 1 Barn. & Adol. 415, and was expressly decided in *Rolin v. Steward*, 14 Com. B. 595, that a banker who refuses to pay a check or draft drawn by a customer who had sufficient funds in the banker's hands is liable not only in nominal damages, but in real and substantial damages. In the latter case an instruction to the jury was approved, in which they were told they ought to give, "not nominal or excessive, but reasonable and temperate damages;" that is, that the jury might assume, because under the circumstances the law would imply some injury from the breach of the contract, although no actual damage was proved and that it was their province reasonably to assess the general damages.

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In *Larios v. Gurety*, L. R., 5 Priv. Coun. 346, certain items of special damage were alleged, of which the court held that one only (£5, the cost of protest) should be allowed. It also reduced the amount found as general damages by reason of a presumed loss of credit by the plaintiff.

In *Prehn v. Royal Bank*, L. R., 5 Exch. 92, the plaintiff recovered certain special damages alleged and proved, and does not seem to have recovered any thing by way of general damages.

Boyd v. Fitt, 14 Ir. C. L. 43, was an action against a defendant upon a contract, whereby he agreed to act as agent in Glasgow for the plaintiffs. Part of the agreement was, that the defendant should open a cash account in a bank to the amount of £500, to be used in honoring and retiring cash orders of the plaintiffs; the latter to put in the hands of the defendant a sum equal to the full amount of orders drawn. Although more than the amount was in his hands, defendant failed to have funds in bank to meet an order for £250, which was dishonored, to (as was alleged) the special injury of plaintiffs, whose credit and business were thereby injured. The special injuries of the plaintiffs were pleaded, since at the trial the lord chief baron "allowed the names of certain persons who had withdrawn their business from the plaintiff, in consequence of their bills having been dishonored, to be introduced into the summons and plaint in addition to those therein mentioned." *Id.* 44. It is true, *LEFROY*, C. B., seems to have intimated that as the jury had found that the special damages were the natural consequences of defendant's breach of contract, the finding could be treated as if it were a finding of general damages. *Id.* 56. But the special injuries, although the natural, were not the necessary consequence of the breach, and it was requisite to plead them as they were in fact pleaded. The general damages which are implied from a breach of contract, and which need not be pleaded, must not be confused with special damages, which will not be presumed from the mere breach, but yet may have occurred by reason of injuries following from it. Such special injuries, if they have occurred, must be averred, in order that the defendant may have notice of, and be prepared to contest them.

Reference has been made to *Fisher v. Val de Travers Asphalt Co.*, 1 C. P. 511, where plaintiff averred certain special damages as being the natural, although not necessary consequence of a breach of contract. *Vide* 1 *Suth. Dam.* and cases cited. The court

allowed part of the special damages claimed, and rejected the rest.

As we understand them, none of the cases referred to hold, that where the damages sustained are not such as would arise naturally "in cases not affected by any special circumstances," the plaintiff may prove such damages without averring the special circumstances (and the other party's knowledge of them) which would entitle him to claim greater damages than such as arise "in the usual course of things."

Evidence on the part of plaintiff of damages beyond such as the plaintiff would ordinarily be entitled to recover for a breach of the contract set forth in the complaint was objected to by the defendant herein, who excepted to the ruling of the court admitting such evidence. Under the averments of the complaint, the plaintiff should have been limited to a recovery of \$1,500, and interest.

Judgment and order reversed, and cause remanded for a new trial. MORRISON, C. J., MCKEE and ROSS, JJ., concurred.

THORNTON, J., concurring.—I concur in the judgment of reversal, and remanding the cause for a new trial, but differ *in toto* from the reasons assigned for such judgment in the opinion.

Rehearing denied.

WALLACE V. AH SAM.

(71 Cal. 197.)

Damages — measure — contingent profits.

In an action for breach of contract to construct a levee, for the purpose of reclaiming swamp land, the loss of possible profits under a lease of the land executed by the plaintiff, without the defendant's knowledge, after the breach of the contract, is not a proper item of damage.*

ACTION for breach of contract. The opinion states the case. The plaintiff had judgment below.

McAllister & Bergin, William L. Dudley and R. Thompson, for appellants.

J. C. Campbell and J. H. Budd, for respondents.

* See *Mitchell v. Clarke*, ante, and note, p. 487.

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SEARLS, C. On the first day of April, 1881, William S. Moss entered into an agreement with John Wallace, Frank T. Baldwin and H. T. Compton, Jr., whereby, in consideration of the covenants and agreements to be kept and performed by the parties of the second part, he bound himself to convey to them the northern half (less one hundred and fifty acres) of a certain tract of land by him owned in the county of San Joaquin.

The tract was swamp and overflowed land, and the consideration upon which the conveyance was to be made required the parties of the second part to reclaim the whole tract from overflow, by means of levees, dams and floodgates, to be by them constructed at their own cost and charge. The agreement specified the dimensions of the levee, etc., and contained a further provision that upon the completion of one-third of the length of the levee Moss would join with the second parties in the execution of a mortgage on the entire tract of land to secure the payment of such sum or sums of money as it might become necessary to raise to complete the work.

No time was specified within which the work was to be done, but it was provided that upon a failure to comply with the provisions of the contract, the agreement to convey should become null and void, and the second parties should forfeit all right thereto.

On the twenty-fifth day of July, 1881, Wallace, Baldwin and Compton, who had agreed to build the levee, entered into a written agreement with Ah Sam, Soon Fook and Lee Fook, defendants herein, whereby the latter undertook to construct the earthwork of the levees at a given price per cubic foot. The work was to be commenced by the first day of August, 1881, and completed by December 1, 1881.

This second contract recites generally the making of the contract with Moss for the sale of the land, the agreement with him to construct the levees, and refers to the record of that contract, etc.

There are a number of other provisions in the second contract, one of which is that authorizing the parties of the first part to hire and put on men to work, provided they should be satisfied the parties of the second part were not likely to complete the work within the time limited, but such additional men were not to be employed until the expiration of the first month, and if employed were to be so located as not to interfere with the work of the second parties.

The contract also recited the provision for a mortgage as specified in the contract with Moss, and provided for a further loan from

defendants, to be secured by a second mortgage on the land to be conveyed to Moss, etc.

The two contracts are set out in the pleadings, and we have only recited such of their provisions as are deemed material to the questions hereinafter considered.

Defendants did not complete the levees by December 1, 1881, there being at that date about one mile thereof remaining to be constructed. They continued to work upon this unfinished portion until on or about March 19, 1882, when they abandoned the work, and a flood coming on the land was overflowed, and could not be cultivated during the year 1882.

The court below, in making up the account between plaintiffs and the contracting defendants, allowed the former \$7,500 damages on account of the loss of a crop upon the land for the year 1882.

The evidence upon which this finding is based tended to show the quantity of grain that could have been produced upon the land in 1882, had the levees been completed in 1881, as per contract, and the prices at which the same could have been sold.

Also that in February, 1882, plaintiffs had leased the land in question, or 1,210 acres of it, to sundry persons for a term of five years, from November 1, 1881, they, the said plaintiffs, to receive as rent therefor one-third of the crops raised each year delivered to them in Stockton.

This evidence was all admitted against the objections of defendants, who excepted to the rulings of the court admitting it, and now assign its admission as error.

The contention of appellants is, that the probable profits on crops not planted are too remote to be allowed in this, an action to recover damages for a breach of contract for the construction of levees.

The argument is based upon the idea that the leases were not made until February, 1882, long after the contract for constructing the levees had been entered into, and could not have been contemplated by the parties when the contract was made.

In *Giacomini v. Bulkeley*, 51 Cal. 261, which was an action in tort for destroying a fence, it was held that evidence to prove that the land would support a given number of cows and hogs, and showing the profits that might have been reaped from them (it not appearing that plaintiff had such animals), was too remote and speculative. See also *Friend, etc., Lumber Co. v. Miller*, 67 Cal. 464, and cases there cited.

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In *Hadley v. Bazendale*, 26 Eng. L. & Eq. 398, it was said : "Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.

"But on the other hand, if those special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally and in the great multitude of cases not affected by any special circumstances for such a breach of his contract."

Ordinarily, the measure of damages for the breach of a contract to construct a levee, a fence, or any similar work is, (1) If payment has been made, the cost of constructing the work; (2) If payment has not been made, the excess of the cost of the work over the contract price.

This we term general damages, and it involves the loss which naturally flows from, and is presumed from the contract and its breach.

In addition thereto, there may be a recovery to such further loss or detriment occasioned by the breach of the contract, and proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.

This last we term special damages, and it is awarded upon the theory that the parties who contracted with a full knowledge of the facts, circumstances, and objects of the agreement, may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach.

In the present case there is such reference made to the contract of plaintiffs with Moss that we are authorized to conclude that defendants contracted to build the levee with full knowledge that it was to be the consideration or condition upon which the land was to be conveyed to plaintiffs, and that the completion of the levee was a condition precedent to the conveyance.

When therefore the defendants violated their contract to complete the levee by December 1, 1881, they must be presumed to have done so with full knowledge that the direct and immediate

consequence of such violation was to prevent plaintiffs from procuring a conveyance of the land until the levee was completed.

It follows that under such circumstances, defendants should be held liable for the use and occupation of the land in its then condition during such reasonable time as was necessary for plaintiffs to complete the violated contract, and thus entitle themselves to a conveyance from Moss, if prevented from occupying and using the land by the non-completion of the levee.

It does not necessarily follow however that the method adopted in the court below was a proper one for estimating the value of the user of the land.

The leases offered in evidence were executed not only after the defendants had entered into the contract, but after its breach.

The land, except a small portion of it, was not cultivated, or sown to grain of any kind, and had it been, we are at a loss to see how plaintiffs would have been entitled to the crops raised upon land which they did not own.

It seems to us that the rule adopted in the court below, if applied to contracts of this character, would tend largely to place it in the power of parties entitled to recover damages to regulate the amount of recovery to suit themselves.

There would be but little risk in contracting to give one-third of a crop which the parties all knew could not be raised.

If it be said the leases were for five years, and therefore any inference of a want of good faith, because the land was not susceptible of cultivation during the first year, is unfounded, we reply that while it tends to meet the objection named, it at the same time suggests another, viz., that it may well be that a tenant could afford to give one-third of the crops raised upon lands of this character for a term of five years, yet owing to the inherent difficulties of cultivating such lands in the first instance, he would be unwilling to give a like quantity or proportion the first year.

We have no reason to believe that plaintiffs acted in bad faith in executing the leases specified in the record, and we only refer to the possibility of such conduct for the purpose of showing that the rule under which such a course may be pursued is inherently vicious.

Had defendants contracted with plaintiffs to crop the land for the year 1882, yielding in return one-third of the crop, and then failed to comply with their agreement, the basis adopted here would have been proper.

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In such a case it could properly be said they contracted with a view to the damages proven

Again, had the leases been executed before defendants agreed to construct the levee, and had their agreement been made with full knowledge of such leases and their conditions, it might with propriety be held that their liability should be measured by the conditions in the leases.

Here however the measure of damages is made to depend upon a subcontract with which the defendants had nothing to do, of which they knew nothing, and with a view to the terms of which they cannot be supposed to have contracted.

In other words, the subcontracts of plaintiffs, with their several lessees, and the possible profits which they might have derived therefrom, are substituted for the value of the premises during the year 1882.

This we think was, under the circumstances of this case, erroneous. *Olmstead v. Burke*, 25 Ill. 86; *Rhodes v. Baird*, 16 Ohio St. 581; *Fox v. Harding*, 7 Cush. 522; *Devlin v. Mayor*, 63 N. Y. 25. *Masterson v. Mayor, etc.*, 7 Hill, 61; a. c., 42 Am. Dec. 38

The judgment and order appealed from should be reversed and a new trial ordered.

BELCHER, C. O., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded for a new trial.

Hearing in bank denied.

ROCHE V. WARE.

(71 Cal. 375.)

Evidence — account-books — account against executor — plaintiff as witness.

A statute prohibiting a party to an action against an executor or administrator from being a witness as to any fact occurring before the death of the deceased, does not prevent the plaintiff in such an action from testifying to the correctness of books of account which had been wholly kept by him, preparatory to their introduction in evidence, and such books cannot be proved by a third person who had no personal knowledge of their correctness.

ACTION against an administratrix to recover for work and labor performed and material furnished by the plaintiff to the deceased. The opinion states the facts. The plaintiff had judgment below.

Stabler & Bayne, for appellant.

T. J. Hart and *George A. Blanchard*, for respondent.

MCKINSTRY, J. Plaintiff's books of account were admitted in evidence over the objection of defendant that they were not sufficiently proved. The only evidence on which the books were admitted consisted of testimony of wife of plaintiff, which tended to prove that the plaintiff had no clerk; that entries were made in original books by the plaintiff on the evening of each day purporting to be charges for work done and material furnished during the day, and that the accounts as entered in the blotter or day-book were correctly transferred to the ledger.

In the English courts tradesmen's books were not formerly legal evidence in favor of the party making them. It would seem that the practice of allowing a party's books of accounts as evidence came into use in New York and New Jersey with the Dutch colonists, and into the eastern States with the English colonists from Holland who settled in New England. 5 Conn. 496; *Conklin v. Stamler*, 8 Abb. Pr. 395; introduction to 1 E. D. Smith Rep. It would seem also that by the Dutch law the cogency as evidence of the books might be strengthened by the testimony of the party.

Yet in *Vosburgh v. Thayer*, 12 Johns. 461, it would appear to have been assumed that the party could not testify with respect to his own books. The Supreme Court of New York there held that books of account ought not to be admitted, "unless a foundation is first laid for their admission, by proving that the party had no clerk, that some of the articles charged have been delivered, that the books produced are the account-books of the party, and that he keeps just and honest accounts, and this by those who have dealt or settled with him." And the court added, "under these restrictions, from the necessity of the case, and the consideration that the party debited is shown to have reposed confidence by dealing with and being intrusted by the other party, they are evidence for the consideration of the jury." In subsequent New

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York cases it was held that a party's books of account were inadmissible unless he proved, not only that he kept just and honest accounts by those who had settled with him by his books, but also that the party charged had dealt with him, and that some of the articles charged were actually rendered or delivered. *Morrill v. Whitehead*, 4 E. D. Smith, 239 ; s. c., 2 Hilt. 432 ; *Conklin v. Stamler*, 8 Abb. Pr. 395.

The practice of all the other States, so far as we are informed, where books of account are admitted in evidence, is to authorize, at least, the preliminary proof to be made by the party himself. In a note to section 118 of the first volume of Greenleaf's Evidence it is said,—many cases being cited to sustain the statement: "The rules of the several States with regard to the admission of this evidence are not perfectly uniform ; but in what is about to be stated, it is believed they concur. * * * If the books appear to be free from fraudulent practices, * * * the party himself is then required to make oath in open court that they are the books in which the accounts of his ordinary business transactions are usually kept, and that the goods therein charged were actually sold and delivered to, and the services actually performed for the defendant." He should also swear that "the entries were made at or about the time of the transactions, and are original entries thereof."

It may be conceded, that if able to do so, the party may prove by other witnesses the matters which he is allowed to testify to himself. But if the party who kept the books, being in a position to give testimony, does not offer himself as a witness to those matters, he must at least prove by others those things which he would be required to prove by his own testimony.

It was said, generally, by DALY, C. J., and BRADY, J., in the New York Common Pleas, that since the Code provisions allowing parties to testify, the books of account of a party are no longer evidence on his behalf ; that the admissibility of such books, on certain preliminary proofs, had been put on the ground of necessity, arising from the former incompetency of a claimant to be a witness on his own behalf, and that the reason of the rule was destroyed by the legislation authorizing the examination of the parties. *Conklin v. Stamler*, 8 Abb. Pr. 400. But it would seem there to be admitted, not only that the books might be referred to to refresh the memory of the witness, but that the entries themselves might be evidence if the witness could testify that the transaction was correctly recorded

when the entry was made, although he might not be able to recollect the "fact."

In the case now here it is urged that the ruling of the court below should be sustained on the ground of necessity, because the plaintiff was prohibited from becoming a witness by section 1880 of the Code of Civil Procedure. It would by no means follow that the preliminary proof would be sufficient if the plaintiff was prohibited from making it by his own testimony. The section of the Code however did not forbid his being a witness for the purpose of making such proof.

Section 1879 of the Code of Civil Procedure provides: "All persons without exception, otherwise than as is specified in the next two sections, * * * may be witnesses." And by section 1880 it is declared: "The following persons cannot be witnesses: * * * 3. Parties to an action * * * against an executor or administrator upon a claim or demand against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person."

The evident purpose of the provisions of the Code is to render competent (with certain exceptions) persons incompetent at the common law; as parties to the record, and those directly interested in the event of the action. The parties, under certain circumstances, excepted from the general rule established by the Code, continue incompetent in the same manner and to the same extent that all parties were formerly incompetent. But before the Code, the party offering his books, although incompetent to be a witness with respect to the issues submitted to the jury, was competent to give testimony, addressed to the court, going to establish the facts which rendered the books admissible. This was determined in *Landis v. Turner*, 14 Cal. 573. There FIELD, C. J., said:

"The defendants objected to the examination of the plaintiff on the ground of his incompetency as a party to the suit, and to the introduction of the book of entries on the ground that it was not sufficiently proved. Neither of these objections was well taken. The evidence of the plaintiff was upon an incidental and preliminary matter, and the rule which excludes the testimony of parties has no application. That rule has reference to the matters in issue, and not to incidental matters auxiliary to the trial of the cause, upon which the testimony is addressed solely to the court. *Bagley v. Eaton*, 10 Cal. 146. The book of entries constituted the evidence in the case bearing upon the issue; the testimony of the party only laid the foundation for the introduction of that evidence. The

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referee occupied the double character of judge and jury, and the admissibility of the book was to be decided by him in the first instance in his character as judge, and to enable him to determine the question, the testimony was properly received. The credit and weight given to the entries were entirely distinct from the preliminary matter. There are it is true, numerous decisions against the reception of the party's testimony in cases like the present, but the clear weight of authority is the other way. His testimony is taken in nearly every State in the Union. When this case was argued we supposed the rule was otherwise, recalling at the time the decisions of the New York courts on the subject. A somewhat extended examination since has satisfied us that the prevailing and the better rule in the United States differs from that of New York. The testimony of the party must often be the only means of establishing the fact that the book contains the original entries, that the party kept no other books, and that he had no clerk, and as it is subject to the scrutiny of a cross-examination, it must afford protection against the perpetration of fraud by false entries."

The plaintiff was competent to make the preliminary proof. There is no pretense he was not within the jurisdiction; for aught that appears, he was present at the trial.

Judgment and order reversed, and cause remanded for a new trial.

MORRISON, C. J., SHARPSTEIN, THORNTON, and MCKEE, JJ., concurred; MYRICK, J., concurred in judgment.

Judgment reversed and cause remanded.

BRALY V. HENRY.

(71 Cal. 481.)

Negotiable instrument — part failure of consideration — evidence of.

In action by an indorsee before maturity on a promissory note given for goods sold, the defendant offered to show that at the time of its execution, the parties, not knowing the exact quality of the goods, agreed that if they fell short of the estimated quantity, a corresponding deduction should be made from the note, and that the goods did fall short of the estimated quantity; and that the plaintiff had notice of these facts before the indorsement. *Held*, admissible.*

* See *Buchanan v. Adams*, *post*.

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ACTION on a promissory note. The opinion state the facts. The plaintiff had judgment below.

Grady & Merriam and E. E. Calhoun, for appellant.

Nourse & Church, for respondent.

SEARLS, C. This is an action upon a joint and several promissory note made by defendant and one W. E. Henry, on the twenty-sixth day of October, 1883, for \$1,364, and interest at twelve per cent per annum, payable four months after date to T. E. Hughes or order, and averred to have been indorsed to plaintiff before maturity, and upon which there is claimed to be due the sum of \$321.15, and interest thereon at twelve per cent per annum from November 24, 1884.

Plaintiff had a verdict and judgment as prayed for in his complaint, for which judgment and from an order denying a new trial, defendant appeals.

The cause was decided by Department One of this court in an opinion reversing the judgment and order appealed from. On petition of respondent, a reargument was ordered in bank, and the cause again comes up for consideration.

The facts essential to an understanding of the question involved are set out in the former opinion, and need not be reproduced here.

Upon a review of the record in the light of the scrutiny invoked by the proceedings had in the cause subsequent to the decision referred to, we see no just cause to doubt the soundness of the views expressed in the opinion, or for changing the conclusion reached therein.

It is true that as a general rule, parol evidence is not admissible to control, contradict, or vary a written instrument.

It is equally true that there are certain legal presumptions indulged in favor of negotiable paper, with a view to facilitate its use and negotiation in commercial transactions, among which are :

1. That until the contrary appears, every negotiable bill or note is presumed to be founded upon sufficient legal consideration.
2. That the holder and possessor of a bill or note is the true owner.
3. That the paper properly indorsed was so indorsed before due.
4. That the holder of a bill or note took it in the usual course of business, before maturity, for value.

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5. That the maker of the note is the primary debtor, and that the acceptor of a bill of exchange is primarily liable thereon.

These and other presumptions, indulged by the process of artificial reasoning known as conclusions of law, and formulated for the advantage of commercial interests and intercourse, are not conclusive, but are liable to be rebutted by parol evidence that the facts are different from what the law in their absence presumes.

The burden of proof in such cases is upon the party who wishes to rebut the presumption.

It is not received to contradict or vary the instrument, but to repel the presumptions of law which, in the absence of such proof, arises in its favor.

As between the original parties to a promissory note, or as to one taking it with notice of the facts, or after maturity, a consideration is as essential to its validity as in case of other contracts.

The maker may, as to such parties, defeat the note *in toto* by showing there was no consideration whatever, or by showing that there was only a partial consideration may *pro tanto* defeat a recovery. Story on Prom. Notes, § 187.

In making proof of the want of consideration in such cases, the maker of the instrument, in effect, says that he made the instrument, but that the presumed legal effect does not follow, because it lacked the consideration essential to uphold all contracts, whether verbal or in writing. It no more changes the contract than does proof of payment or any other defense which admits its execution and awards its legal effect.

A want of consideration must not be confounded with mere inadequacy of consideration. The latter cannot be set up to defeat a note.

To illustrate : A. sells to B. ten horses at \$100 each, and takes his note. B. cannot, in an action on the note by the payee, in the absence of fraud, show the horses to have been worth less than the agreed price, and thus abridge the recovery, as it would only establish an inadequacy of consideration, but he may show that none of the horses were delivered, and thus defeat the recovery, or he may show that five only of ten horses were delivered, and defeat a recovery *pro tanto*.

Apply the doctrine to the present case. Defendant, according to the testimony offered, purchased a given number of tons of hay, at a given price per ton, and gave his note for the amount ; the quan-

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tity when weighed proved to be less by a number of tons, which, multiplied by the price per ton, equaled \$321.15.

If the proffered evidence stopped here, defendant, as against the plaintiff (if the latter took with notice), would have been entitled to a proportionate reduction upon the sum called for by the note; and we are unable to see how defendant's rights are abridged by the fact that the parties, not knowing the quantity of hay, agreed that if it fell short of the estimated or supposed quantity, a corresponding credit should be given on the note.

We are of opinion the judgment of reversal heretofore entered should stand as the judgment in the case.

BELCHER C. C., and FOOTE, C., concurred.

The COURT.—For the reasons given in the foregoing opinion, and in the opinion of Department One, the judgment and order are reversed, and cause remanded for a new trial.

The following is the opinion of Department One above referred to, rendered on the 27th of May, 1887.

McKINSTREY, J. The appeal is by the defendant. In his answer the defendant averred: "Defendant alleges that said note was made in consideration of hay purchased of said T. E. Hughes by the defendant; that said Braly was, at the time of such purchase, interested with said T. E. Hughes in said hay, and part owner thereof, and was and is interested in the transaction of which said note forms a part, and is not an innocent purchaser, before maturity, for value of said note; that at the time said note was given the quantity of hay purchased by the defendant, as aforesaid, was not known by any of the parties, but was by plaintiff estimated to be of the value of said note, and said note was given under an agreement between the parties to said transactions, at the time said note was given, that if said hay, when the number of tons should be ascertained, should not amount in value to the face of said note, at a fixed price per ton, that then a rebate and credit would be made in favor of defendant herein, of the difference between the actual value of the hay, ascertained as aforesaid, and the face of said note; that the quantity and value of said hay was ascertained in accordance with said agreement to be \$321.15 less than the face of said note."

The defendant offered evidence of the facts alleged in the answer, which the court below refused to admit, and in effect, charged the jury to find for the plaintiff. In *Carter v. Hamilton*, Seld. Notes,

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231, the Court of Appeals of New York held that where there was a sale of a field of wheat called 105 acres, but sold subject to measurement, for which the purchaser gave his note, estimating it at 105 acres, and the measurement fell short, the purchaser had a clear right to deduct for the deficiency, on the ground of the failure *pro tanto* of the consideration of the note. We think the defendant here should have been allowed to prove the oral contract alleged in the answer. The evidence, if admitted, would not have varied or contradicted the terms of the writing as expressed in the promissory note.

The defendant does not deny in his answer that he made just such a contract as that on which the plaintiff seeks to recover, but alleges that the assignor of plaintiff at the same time entered into an engagement on his part which was subsequently broken. For his damage arising from a breach of the contract of the vendor of the hay the defendant is entitled to recoup in an action brought upon his note. In *Batterman v. Pierce*, 3 Hill, 171, it was held, a promissory note having been given on sale of wood, that in an action on the note the payor was authorized to prove a verbal contemporaneous agreement of the payee (seller of the wood), that if the wood was burned by its setting fire to his fallow, he would guarantee the purchaser against any damages the consequence of the firing of his fallow. *Johnson v. Oppenheim*, 55 N. Y. 280-293, the case of *Morgan v. Griffith*, L. R., 6 Ex. 70, and *Erskine v. Adeane*, 8 Ch. App. 756, were said to be within the rule which allows a "collateral agreement made prior to or contemporaneous with a written agreement, but not inconsistent with or affecting its terms, to be given in evidence." The question is very fully gone into in *Chapin v. Hobson*, 78 N. Y. 74; s. c., 34 Am. Rep. 512. The plaintiff had sold to the defendant certain machines, being "breaker feeders." A contract was reduced to writing and signed by both parties. By its terms the plaintiffs agreed to sell the machines of certain sizes, and the writing contained a clause: "Terms, cash on delivery, five per cent commission to be allowed on each machine; five sixty-inch and four forty-eight-inch to be delivered as soon as possible, the balance in thirty days thereafter." The amended answer of the defendant set forth a parol guaranty to the effect that the machines should be so made that they would do the defendant's work well and satisfactorily, or that in case of failure, they should be taken back, and not paid for. The answer also averred that the

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machines were so badly constructed that they could not be made to do the defendant's work well or satisfactorily. There was evidence on the part of the defendant to sustain the averments. The court held that the facts alleged and proved constituted a defense, and that the oral agreement did not contradict or vary the written contract.

In the case at bar there is nothing to indicate that the promissory note was intended to express the whole contract of the parties. The entire contract, as alleged in the answer, was that the vendor should deliver the stack of hay, estimated to contain a certain number of tons; that the vendee should give his note for the amount to which the hay would come, assuming the estimate to be correct; but the vendor agreed that if the hay should fall short he would give the vendee credit, or release him from the payment of a proportionable sum. If all the promises of the parties had rested in parol; if the vendee had agreed orally to pay a certain sum at a certain time if the hay should be in quantity as estimated, but should pay ratably less if there should be a deficiency,—he could not be compelled to pay the whole sum named if the quantity did not hold out. And so, if the whole contract of both parties had been reduced to writing. “Nor (as was said in *Batterman v. Pierce, supra*) can it make any substantial difference that the undertaking of one party has been reduced to writing while the engagement of the other party remains in parol.”

Judgment and order reversed, and cause remanded for a new trial.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

HANSBERG V. PEOPLE.

(120 ILL. 71.)

Criminal law — "intoxicating liquor" — beer.

Beer is not necessarily an "intoxicating liquor." *

CONVICTION of selling "intoxicating liquor" to a minor. The opinion states the case.

Rubens, McGaffey & Ames, for appellant.

George Hunt, attorney-general, for people.

CRAIG, J. This was an indictment against Charles Hansberg, for a violation of section 6 of chapter 43 of an act entitled "Dram-shops," which is as follows: "Whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, without the written order of his parent, guardian or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall, for each offense, be fined not less than \$20 nor more than \$100, and imprisoned in the county jail not less than ten nor more than thirty days." The indictment contained six counts, in each of which the defendant was charged with selling intoxicating liquor to a minor, in violation of the statute. To the

* See note, 58 Am. Rep. 86.

indictment the defendant pleaded not guilty, and on a trial before a jury he was found guilty in manner and form as charged in the second and third counts of the indictment. The court overruled a motion for a new trial, and entered a fine of \$100 against the defendant for each offense of which he had been found guilty.

The violation of the statute for which a fine is imposed consists in selling or giving intoxicating liquors to a minor without the written consent of the parent, etc. What was intended by the term "intoxicating liquors," as used in the section under which the indictment was passed, will be found in section 1 of the act, as follows: "That a dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act." Here the defendant was indicted for selling to a minor intoxicating liquor — that is, spirituous, vinous or malt liquor. It was not proven on the trial of the cause that the defendant had sold spirituous, vinous or malt liquors, or lager beer, but the proof, and only proof, was that he had sold "beer." No evidence whatever was offered or admitted for the purpose of explaining or showing what "beer" was made of, or what its characteristics were, or whether it was malt, vinous, spirituous or intoxicating. On all these matters the jury were left without evidence and entirely in the dark. Under such circumstances, was the court authorized in instructing the jury, as was done, that they should find the defendant guilty, if they found from the evidence that he sold intoxicating liquors, as charged in the second and third counts of the indictment

It is a familiar rule that instructions must be based upon the evidence, and unless there was some evidence before the jury that the defendant had sold intoxicating liquors, it was error to so instruct; as an instruction, where there is no evidence whatever upon which it can be predicated, is calculated to mislead. It was not enough for the people to prove merely that the defendant sold "beer" to a minor, because section 6 of the Dram-shop Act was only violated by a sale of intoxicating liquors, and what is included in and known as "beer," is not necessarily an intoxicating liquor. In Webster's Unabridged Dictionary we find the following definition of the word "beer:" "1. A fermented liquor, made from any malted grain, with hops and other bitter flavoring matters. 2. A fermented extract of the roots and other parts of various

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plants, as spruce, ginger, sassafras, etc. Beer has different names, as small beer, ale, porter, brown stout, lager beer, etc., according to its strength or other qualities."

From the definition of the word "beer," given, can it be said that the article purchased was an intoxicating liquor? Suppose the "beer" purchased was made of spruce, of ginger, or sassafras, according to the definition of Webster it would have been beer, and yet not an intoxicating liquor, and the statute would not have been violated by its sale. The fact is beyond dispute that there are different kinds of beer. Some are intoxicating, others not. Whether beer which may be sold in a given case is malt or intoxicating beer, or ginger or root beer, or some other of the various kinds of beer which are known not to be intoxicating, is always a question of fact, to be determined from the evidence introduced on the trial. Our statute does not prohibit the sale of beer. If it did, it would be sufficient for the prosecution to prove a sale of beer, just as was done in this case. But unless the language is to be disregarded, the statute prohibits the sale of intoxicating liquor, and when beer has been sold, it is necessary to show, by the evidence, that the article sold falls within the prohibition of the statute, otherwise a conviction cannot be sustained. Had the proof been that the beer was intoxicating, as held in *Godfreidson v. People*, 88 Ill. 284, or that it was lager beer, as ruled in *Bandalow v. People*, 90 Ill. 218, the instruction would have been proper, and the conviction right. But such was not the case. The following authorities are in point on the question involved: *Lathrop v. State*, 50 Ind. 555; *Klare v. State*, 43 Ind. 435; *State v. Chappel*, 116 Mass. 7; *Commonwealth v. Blas*, 116 Mass. 56; *State v. Starr*, 67 Me. 242; *State v. Wall*, 34 Me. 165; *State v. Riddle*, 54 N. H. 379; *Kins v. State*, 79 Ind. 488.

In the last case cited, under an indictment which charged that defendant unlawfully gave to a person under the age of twenty-one years intoxicating liquor, where the gift was proven to be "beer," quoting from a former case, the court said: "Beer may be, but is not necessarily a malt liquor, and may not be intoxicating. It devolves on the State therefore to prove that the beer sold was either a malt liquor, or that it was in fact intoxicating liquor. Neither of these facts could be presumed, or judicially recognized." The other cases cited will also, upon examination, be found to be in harmony with the views we have expressed.

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The rule here indicated imposes no hardship upon the prosecution. If the beer sold in this case was malt or intoxicating liquor, that fact might have been proven by a single question propounded to the witness on the stand. Under the evidence, as shown by the record, we think the first instruction given for the people was calculated to mislead the jury.

The judgments of the Appellate and Circuit Courts will be reversed, and the cause remanded.

Judgment reversed.

SCOTT, C. J., and SHELDON, J., dissenting,

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(120 Ill. 26.)

Marriage — revocation of will by — ante-nuptial agreement to release donor — statute of frauds — ratification.

Under a statute that "marriage shall be deemed a revocation of a prior will," such a will is absolutely revoked as to all persons by marriage.

An oral ante-nuptial agreement by a woman to renounce all interest in her intended husband's estate after his death is void under the statute of frauds, and is not made valid by the subsequent marriage, nor by her executing, after marriage, a written agreement to that effect, purporting to have been executed before marriage.

BILL to contest a will and for partition. The opinion states the case. The defendant had judgment below.

Geo. A. Anderson and Bonney & Woods, for appellant.

J. N. Sprigg, for appellee.

MULKEY, J. Samuel McAnnulty, a widower, well advanced in life, on the 19th of September, 1882, made his last will and testament, by which he disposed of all his estate, real and personal, among his children and grandchildren. The dispositions of the will were much more favorable to some of the devisees than to others standing in the same relation to the testator but for the purposes of the questions to be considered this general reference to the inequalities of the will is all that is necessary. On the 18th of October of the following year, the testator intermarried with Margaret Thompson,

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who had a farm and other property of her own, and a number of grown children by a former husband. On the 26th of October, 1885, McAnnulty died, leaving his widow, Margaret McAnnulty, and the devisees under the will, him surviving. The will having been admitted to probate, James A. McAnnulty, a grandson of the testator, and one of the appellants herein, filed a bill in the Circuit Court of Adams county to contest the will, and praying for a partition of the real estate of which the testator died seised, according to the statute of descents. To this bill, the widow, and all the devisees under the will except the complainant, were made defendants. After the answers were in and replications filed, the court ordered an issue at law to be made up as required by the statute, which by agreement of parties was tried by the court without a jury. The court, upon hearing the proofs, sustained the will, and entered a decree dismissing the bill, from which the complainant and widow have appealed to this court.

The contention of appellants is, that the marriage of the testator subsequent to the making of the will operated as an absolute revocation of it, to the same extent as if the testator had deliberately revoked it by cancellation. On the other hand, as we understand counsel, it is claimed that a subsequent marriage revokes a will as to the party marrying the testator or testatrix, and as to the issue of such marriage, only. If the latter position is the correct one, it is quite clear the complainant has no such interest in the subject-matter of the suit, particularly the land sought to be partitioned, as will enable him to maintain the bill. The will gives him \$500 in money, but no interest whatever in real estate. The right of complainant to have it partitioned is rested solely upon the hypothesis that the marriage of his grandfather operated as an absolute revocation of the will, and that by reason thereof the land in question became intestate property.

If section 10, chapter 39, of the Revised Statutes, which has been in force since 1872, is to be given effect according to the letter of the act, and what would seem to be its manifest import, it is difficult to escape the conclusion which appellants draw from it. That section, after providing for the case of a child being born to a testator after the making of a will, which has no bearing at all upon the question now under consideration, then concludes in these words: "And a marriage shall be deemed a revocation of a prior will." We have not been able to find, nor have we been referred to, any provision

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In the statute which modifies or limits this plain and unequivocal declaration of the legislature. The only case cited where this question was raised, since the act of 1872, is *In re Tuller*, 79 Ill. 99. In that case the execution of the will, and subsequent marriage, both occurred before the act of 1872 went into effect, though the testatrix did not die till afterward. It being insisted there, as it is here, that under the act of 1872 the subsequent marriage operated as an absolute revocation of the will, this court, in disposing of the question, said: "It is finally insisted, that there is here a statutory revocation of the will, by force of the statute of 1872; * * * that 'a marriage shall be deemed a revocation of a prior will;' that as the will did not take effect, nor were any rights acquired under it, until the testatrix's death, its validity depends upon the law as it then stood at the time of her death; that the statute, though passed after the making of the will, takes effect upon it precisely as though the law had been passed before its execution." The court, after discussing at some length the question whether the act cited should be extended to a will executed before its passage, finally held that it did not. Now, if the construction then contended for, and at present contended for by appellants, is not the true one, much time and labor might have been saved in that case by simply saying so, instead of entering into an extended argument to show the statute of 1872 did not apply.

The eighteenth section of chapter 26, 1 Vict., passed in 1837, provides "that every will made by a man or woman shall be revoked by his or her marriage, except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of such appointment, pass to his or her heir, customary heir, executor or administrator, or the person entitled as his or her next of kin, under the statute of distribution." While we have found no English case construing this provision, which we can account for only on the ground that the language is so plain that no one has ever questioned the plain import of the language used, yet Jarman, in his work on Wills (vol. 1, star page 129), in referring to this provision, expressly declares, "that unless in the expressly excepted cases, marriage alone will produce absolute and complete revocation as to both real and personal estate," etc. A like statute was passed in 1850 by the Virginia legislature; and Lomax, in his Digest (vol. 3, p. 148), says of it, in

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substance, what is said by Jarman in respect to the British act. See also *Phaup v. Woodbridge*, 19 Gratt. 332. The adoption of this provision in England and in some of the States of this country doubtless had its origin, in part, in the diversity of the rulings of the courts and the conflict of opinion with respect to the revocation of wills by implication, on account of marriage, birth of issue, etc.

With certain exceptions and limitations, the general rule at common law undoubtedly is, that marriage, alone, of a *feme sole*, revokes, by implication, a prior will, except when it operates as an appointment under a power, and except also in those States, including our own, where the property rights of a married woman are put upon the same footing as those of married men. This rule is rested on the distinct ground that marriage, in the case of a woman, destroyed the ambulatory nature of the will, and left it no longer subject to the wife's control, which is contrary to the very nature of a will. These consequences necessarily resulted from the common-law doctrine that the legal existence of the wife, during coverture, was merged in that of her husband. As to a man, marriage alone would not revoke a prior will. It required both marriage and birth of issue. The revocation, even from these circumstances, by the common law, does not universally follow. Presumptively, it does, and in the absence of any thing to the contrary, they will be held to have that effect. The reason of the rule is, by the earlier authorities, based upon a presumed change in the testator's intentions, caused by the complete change of his situation, resulting from marriage and birth of issue. This logically led to the practice of receiving evidence tending to rebut the presumption which necessarily involved the subject in more or less uncertainty. *Brady v. Cubet*, Dougl. 31; *Goodtitle v. Otway*, 2 H. Bl. 522. But the receiving of such evidence was never fully concurred in by the profession, and was finally rejected by the courts. *Marston v. Roe*, 8 Ad. & El. 14. In this state of the law the provision in the British statute, above cited, was adopted, and quite a number of the States of the Union, including our own, have enacted, with some diversity, similar provisions. The decisions of this court, based upon the law as it stood before the act of 1872, will be found to have taken the most advanced ground in favor of implied revocation of wills from marriage, as will fully appear from the cases of *Tyler v. Tyler*, 19 Ill. 151; *American Board v. Nelson*,

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72 Ill. 564, and *Duryea v. Duryea*, 85 Ill. 41. The most accurate presentation of the law on the subject, as it existed before the act of 1872, is found in the opinion in the *Tuller* case, 79 Ill. 99, above cited.

In view of the advanced position taken by this court upon the subject, if the statute of 1872 is to have any effect at all, a marriage since its adoption, whether of a man or woman, must operate, *per se*, as a revocation of a prior will, and so we hold.

As respects the appellant, Mrs. McAnnulty, it is claimed by appellees that there was an ante-nuptial agreement between her and the testator, wherein for a valuable consideration she released and relinquished all interest in said claim to the testator's estate, in the event of her surviving him, and that consequently she now has no interest in the estate. On the hearing, an agreement, bearing date the — day of October, 1883, and purporting to have been signed by both the parties, was put in evidence, which if executed by her before the marriage we think fully sustains the claim of appellees. It is not pretended however that it was executed by either of the parties before the marriage; but appellees insist, that although the written contract was not signed until after that time, yet the terms of it are identical with those of the verbal agreement made before the marriage, and that it should therefore be given the same effect as if it had been signed before the marriage. Appellants deny that any such agreement as that embodied in the instrument was in fact made. They also deny that the instrument in question was ever signed by Mrs. McAnnulty or by any one for her, authorized to do so.

The instrument, by its very terms, implies an execution of it before the marriage, such terms not being applicable to a post-nuptial contract, even if that kind of a contract could be of any avail, a question which does not arise here. The defense of appellees rests upon an alleged ante-nuptial written agreement. As this instrument was not executed until about a month after the marriage, it is clear that if any agreement existed before or at the time of the marriage, it was a mere verbal agreement, and as such, it is obnoxious to the statute of frauds. The first section of chapter 59 of the Revised Statutes, among other things, declares "that no action shall be brought whereby to charge * * * any person upon any agreement made upon consideration of marriage." This alleged ante-nuptial agreement clearly comes within the provision

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of this section and the statute must be given effect unless something has occurred to take the case out of its operation. The signing of the written instrument after the marriage can be regarded, at the very farthest, as nothing more than a mere acknowledgment, in writing, of the terms of the previous verbal agreement, and this certainly does not meet the requirements of the statute, for the simple reason the statute requires the contract itself to be in writing. The case is unlike that of an express trust, which is only required to be "manifested and proved" by some writing. Doubtless a verbal ante-nuptial agreement might, under special circumstances, be enforced in equity, in order to prevent the party invoking the statute from perpetrating a fraud upon the other party. Thus if in this case, Mrs. McAnnulty had by some artifice, trick or device prevented the contract from being reduced to writing, and had received any substantial benefits from it, so that it would have operated as a fraud upon the testator, we have no doubt of the power of a court of equity in such case to afford the proper relief, notwithstanding the statute, on the general principle that the statute is never to be so expounded as to make it a mere instrument in consummating a fraud upon the party against whom it is invoked. *Jenkins v. Eldridge*, 3 Story, 181; 2 Pom. Eq. Jur., § 921.

That marriage is not sufficient to take such an agreement out of the statute is clearly established by an unbroken current of authority. *Crane v. Gough*, 4 Md. 316; *Henry v. Henry*, 27 Ohio St. 121; *Flourier v. Flourier*, 29 Ind. 564; *Brown v. Conger*, 8 Hun, 625; *Finch v. Finch*, 10 Ohio St. 501; *Hackney v. Hackney*, 8 Humph. 452; *Wood v. Savage*, 2 Doug. 316; *Lloyd v. Fulton*, 91 U. S. 479.

With respect to the written instrument, there is a sharp conflict in the testimony as to whether Mrs. McAnnulty ever signed it. The evidence in support of the hypothesis that she did consists mainly of alleged admissions on her part, testified to in the main by persons interested in sustaining the will. She swears positively that she never either signed it herself, or authorized anyone else to sign it for her. No one swears to having seen her sign it, nor is her name to it shown to be in her handwriting. Indeed in our judgment the decided weight of evidence shows she could neither read nor write, and consequently could have no handwriting. She not only swears this herself, but it is testified to by her grown daughters, and her neighbors who had had occasion to do business

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with or for her. Besides this a number of documents and instruments executed by her, and extending back to a period long before her marriage with McAnnulty, were put in evidence, from which it appears she uniformly executed such instruments by making a cross mark between her christian and surnames, as is usually done by those who cannot write.

There are other features in the evidence favorable to appellants which are worthy of notice, but we do not feel at liberty to extend the discussion further, as it sufficiently appears, from what we have already said, the law is with appellants.

The decree of the court below is reversed, and the cause remanded for further proceedings in conformity with the views here expressed.

Decree reversed.

BLOOMINGTON MUTUAL BENEFIT ASSOCIATION V. BLUE.

(120 ILL. 121.)

Insurance — life — interest — assignment by insured to one without interest.

SUFFICIENTLY reported, 58 Am. Rep. 852.

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(120 ILL. 350.)

Corporation — stockholder's liability.

Under a bank charter providing that stockholders "shall be individually liable to the amount of their stock for all the debts of the corporation," *held*, (1) that the liability reaches to the nominal value of the stock, and not merely to the unpaid balance on stock subscriptions; (2) that the stockholder is liable although he was not a stockholder when the creditor's cause of action accrued.

ACTION to enforce stockholder's individual liability. The opinion states the points. The plaintiff had judgment below.

Sibley & Pope and A. Wheat, for appellant.

W. McFadon, for appellee.

SCHOLFIELD, J. We have carefully considered the questions discussed in the printed arguments before us, and we concur in the conclusions reached by the Appellate Court.

First. The contention of appellant is, that the liability imposed by the seventh section of the charter of the Union Bank of Quincy, upon the stockholders, is simply to pay the creditors of the bank the balance unpaid upon subscriptions for stock. The language of the seventh section, affecting this question, is: Provided also that the stockholders in this corporation shall be individually liable, to the amount of their stock, for all debts of the corporation; and such liability shall continue for three months after the transfer of any stock on the books of the corporation." The plain and obvious meaning of this language is, to our minds, the stockholders are liable to creditors for their debts, to an extent measured by the amount of their stock. Omitting the clause expressing the extent of liability, and we have this: "The stockholders in this corporation shall be individually liable for all debts of the corporation." If this were all, their liability would be unlimited — they would be absolutely liable for all debts of the corporation. The intention however is to limit that liability; but to what extent? The answer is: "To the amount of their stock" — not to the amounts unpaid upon their stock. The language makes the liability because of the fact of being stockholders, and not because of the fact of being debtors of the corporation. If the liability intended was simply to pay the creditor the amount due the corporation, what would have been more natural and easy than to have used just that language? The difference between a stockholder and a debtor for unpaid stock is recognized in several of the sections, and so was, at the time, in the legislative mind, and it must therefore be presumed that words expressing the one would not have been used to express the other, in this instance. Thus in section 3, a majority of the corporators are required to designate a time and place for the first election of the directors of said corporation "by the parties subscribing for the capital stock thereof, and each share of stock so subscribed for shall be entitled to one vote." By section 4, "the payment of the stock so subscribed shall be made and completed by the subscribers at such time and manner as the said directors shall prescribe." By section 14, "the directors shall have the right, in case that any stockholder shall fail to pay any installment for thirty days after a call thereof, * * * to declare the stock forfeited to the corporation, * * *

or * * * sue for and recover the entire amount of subscription remaining unpaid." By section 5, "no subscriber of the stock * * * shall have the right to vote at the first election of the directors unless he shall have paid ten per cent of the amount subscribed, * * * nor shall any subscriber or stockholder have, at any time, the right to vote at any election, held by virtue of this act, who shall be in default to the corporation for any payments, either in stock held by him, or otherwise." And by section 10, "in all elections of directors, and in deciding all questions at meetings of stockholders, each stockholder shall be entitled to one vote for each share; * * * and no stockholder whose liability is past due shall be allowed to vote." In no instance is the word "stock" used in the sense of a debt or obligation due from the stockholder, but it is at all times used to express the idea of property in the corporation — what may be the subject of a debt, it is true, but is not itself a debt, any more than is any other property. And in this connection we will observe, that we are unable to appreciate the distinction which counsel seek to draw between the words, "liable to the amount of their stock," and the words, "liable in a sum equal to the amount of their stock," which is frequently found in similar charters, they conceding, as we understand their position, that on the authority of decided cases, if the latter language had been here used, their client would be liable, as held by the lower courts. But since the words, "to the amount of their stock," in no view mean the thing which is itself to be paid to the creditor, but are in every view simply used to express the measure by which the sum of money of which the creditors may enforce payment is ascertained, "liable to the amount of their stock" is but stating elliptically what is fully stated by the words, "liable in a sum equal to the amount of their stock." Liable to an amount can mean only liable to pay a sum which reaches or comes up to, or in short equals the great amount. So here, the nominal or face value of the shares of stock is \$100 each; and if A. have two shares, we say the amount of his stock is \$200, the nominal or face value of his stock. And therefore to say that he is liable to the amount of his stock, for the debts of the corporation, is only another form of saying that he is liable to the amount of \$200 for the debts of the corporation.

Counsel for appellant, by contending that the liability of their client is only for the amount of his unpaid indebtedness on his sub-

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scription for stock, impliedly concede the correctness of this construction, for if he be thus liable, the words "liable to the amount of," must be held to mean liable in a sum equal to the amount of the balance unpaid on his subscription for stock. The same necessity for comparison, and the same words of comparison equally apply in either view, the only difference being that the measure or standard by which the comparison is to be made is in one view the nominal or face value of his stock, and in the other, the nominal or face value of the amount unpaid on his subscription for stock.

But this ought not now to be regarded an open question in this court. We have in numerous cases, without much discussion, it is true, held or assumed that language of the same, or substantially the same import meant what we have indicated, in our opinion this means. *Culver v. Third Nat. Bank of Chicago*, 64 Ill. 528; *Tibballs v. Libby*, 87 Ill. 142; *Bromley v. Goodwin*, 95 Ill. 118; *Wincock v. Turpin*, 96 Ill. 141; *Harper v. Union Manf. Co.*, 100 Ill. 225; *Eames v. Doris*, 102 Ill. 350; *Thompson v. Meisser*, 108 Ill. 362; *Quennan v. Palmer*, 117 Ill. 619. And the same construction has been placed upon like language in New York and Pennsylvania. *Slee v. Bloom*, 20 Johns. 683; *Briggs v. Penniman*, 8 Cow. 395; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. 473; *Matter of Empire City Bank*, 18 N. Y. 218; *Lane's Appeal*, 105 Penn. St. 57; s. c., 51 Am. Rep. 166.

Second. The next question is, should it affirmatively appear that appellant was a stockholder when the cause of action accrued, or is it sufficient that he was a stockholder when suit was brought? In our opinion, it is sufficient that appellant was a stockholder when suit was brought. The liability is because of being a stockholder, that is, because of the ownership of stock. *Wheelock v. Kost*, 77 Ill. 298. As was said in *Brown v. Hitchcock*, 36 Ohio St. 681, "the expression, 'all stockholders,' must be regarded, in the absence of any legislative indication to the contrary, as including not only those who were such at the time the indebtedness was incurred, but all those who successively stand in their shoes in respect to the same stock." The liability being because of the ownership of stock, it follows the stock into whosoever hands it may go, and whoever purchases it does so at the risk of this liability, and in consonance with this view, we have held, that the liability once discharged, the stock is thereafter free of any further liability on account of ownership. *Thebun v. Smiley*, 110 Ill. 816.

The rule is thus stated in Thompson on Liability of Stockholders, section 90: "But in the absence of special statutory provisions the general rule, applicable alike to the English joint stock company and the American corporation is, that liability as contributors, or to creditors, attaches not merely to those who are members at the time or before the debt was contracted, but to those who were such, either, first, when by reason of the stoppage, dissolution or winding up of the company, the right to transfer shares ceased; or second, in the case of direct proceedings by creditors against shareholders, when the right of the creditors against the shareholder became fixed in an appropriate proceeding." See also to like effect, *Middleton Bank v. Magill*, 5 Conn. 28; *Curtis v. Harlow*, 12 Metc. 8; *Holyoke Bank v. Bernbow*, 11 Cush. 183; *Johnson v. Summer-ville Dr. Bl. Co.*, 15 Gray, 216; *McCulloch v. Moss*, 5 Denio, 567; *Matter of Empire Bank*, 18 N. Y. 223; *Johnson v. Underhill*, 53 N. Y. 203; *McClaren v. Franciscus*, 43 Mo. 464.

The fact that we held in *Buchanan v. Meisser*, 105 Ill. 638, and *Thompson v. Meisser*, 108 Ill. 359, that the stockholders, in such cases, are in effect partners, is not inconsistent with this view, since every assignment of stock makes a new partnership, and the new partnership assumes the debts of the old partnership; and the rule in such cases permits the creditor to pass by the partnership primarily liable, and sue that having assumed the debt. See Lindley Partn. 455, 456, and notes.

In *Culver v. Third Nat. Bank*, 64 Ill. 528, the present question was not considered. It was sufficient there that there was a right of recovery under the averments of the declaration. The remarks regarded as intimating contrary to the present ruling were unnecessary to a decision of the question then being considered, and were not intended to announce any rule of law. *Fuller v. Ledden*, 87 Ill. 310, merely decides that the stockholder who owns stock when the debt is incurred is liable; but that is not inconsistent with the liability of the owner of the stock at the time suit is brought. *Thebus v. Smiley*, *supra*. *Hull v. Burtis*, 90 Ill. 213, turned on the question whether the suit should have been in the name of the corporation or in that of the creditor. And so in our opinion the demurrer was properly overruled as to both counts of the declaration.

The judgment is affirmed.

Judgment affirmed.

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(120 ILL. 422.)

Landlord and tenant — agreement to fix rent by referees—when not arbitration.

A lease provided that from a certain day the rent should be agreed upon by three disinterested persons, to be chosen one by the lessor, one by the lessees and the third by the two thus chosen. This was done, but only two of the referees were able to agree. *Held* (1) that this was not an arbitration; (2) that the decision of the two referees was not valid; (3) that the lessor might recover a reasonable rent for the period in question, payable presumably at like times and in like manner as provided in the lease for the first part of the term.

ACTION for rent. The opinion states the case. The defendant had judgment below.

William C. Wilson and David L. Zook, for appellant.

Barnum, Rubens & Ames, for appellees.

SHOFF, J. The question presented by this record is, whether the court below erred in sustaining the demurrer to the first, second and third counts of the plaintiff's declaration. By the first count the plaintiff sought to recover \$215, a month's rent, according to the terms of the written lease, and relying upon the finding of two of the three referees chosen under the provisions of the lease, as an award final and conclusive as to the rent to be paid under the lease. The lease does not show, upon its face, that he is entitled to receive that sum per month for the use of the demised property after May 1, 1884. In the lease, the parties did not fix the rent from and after that date, but provided a mode by which it was to be determined, and when ascertained in that mode was to be as binding as if fixed by themselves and inserted in the lease. The monthly rental after May 1, 1884, was to be fixed by three disinterested persons, owning and renting property in Chicago, each of the parties to the lease to select one, and those thus chosen to select the third. The parties had the right to make such an agreement, and if the persons so selected had agreed upon the rent to be paid, their decision, in the absence of fraud, would have been conclusive upon the parties. The language of the lease on this point is: "The rent for the remain-

ing four years, from May 1, 1884, to May 1, 1888, to be made and agreed upon by three disinterested parties," to be chosen, etc. The plaintiff contends that the provision for the selection of three persons to fix the rent indicates an intention that a majority might fix the rent, otherwise an odd number would not have been agreed upon. In this respect, the submission does not differ from an ordinary submission to arbitrators, and the power of the referees to make a binding award should be construed in the same way. The matter of fixing the rent was confided to the judgment, experience and discretion of the persons nominated by the parties and the one to be selected by such nominees. The confidence of the parties was in the united judgment of the three, and they agreed to be bound by nothing less than their concurrent judgment. If the conclusion of Campbell and Sinclair is to be taken, it cannot be said that the rent has been agreed upon "by three disinterested persons."

We do not think the reference to this case was an arbitration, in the strict sense, for the reason that when the lease was made there was no difference or dispute between the parties to be settled, nor was there any at the time the referees were selected, and as stated by this court in a similar case (*Norton v. Gale*, 95 Ill. 533; s. c., 35 Am. Rep. 173), "the object was to preclude or prevent the arising of differences,—not to settle differences which had arisen." In that case, the rent, after five years, was fixed at six per cent of the appraised value of the demised premises, and before the end of five years each party was to select an appraiser, who were to select a third in case they could not agree, and their award was to be final. The two appraisers did agree, but failed to give the parties notice of the time and place of their meeting, which failure to give the parties an opportunity to be heard would have been fatal, had the proceeding been an arbitration of matters in dispute. This court held that there was no arbitration, referring to *Leeds v. Burroughs*, 12 East, 1; *Lee v. Hemingway*, 2 Nev. & M. 860; *Collins v. Collins*, 26 Beav. 306; *Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 389; opinion of Senator Seward in *Garr v. Gomez*, 9 Wend. 649; *Mason v. Bridge*, 14 Me. 468; *Oakes v. Moore*, 24 Me. 214; *Rochester v. Whitehouse*, 15 N. H. 468; Russ. Arbit. (3d ed.) 43; Morse Arbit. and Award, 40.

The persons here selected were not to make an award for the payment of money by one party to the other. No rent was then claimed to be due, and had they agreed upon the rent to be paid under the

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lease after May 1, 1884, no action would lie on the award itself. The action would have to be brought on the lease, and the amount fixed upon by the persons chosen, as rent to be paid under the lease, would, in the absence of fraud, afford conclusive evidence of the extent of the lessee's liability thereunder. It is also true that these referees had no power, under their appointment, to give a binding construction of the lease, as whether the rent for the last four years was payable monthly, monthly in advance, annually, or at the end of the term. *McAvoy v. Long*, 13 Ill. 147. The extent of their authority, under the provisions in the lease, was simply to agree upon what would be a fair and reasonable rent per month for the unexpired term.

But whether the lease provided for a submission to arbitrators, or whether their finding is technically an award or not, is immaterial, as it makes no difference whether its binding effect grows out of their contract that the rent shall be fixed by the united judgment of the three, or from treating the finding as in the nature of a judgment. In either event, it is equally binding and conclusive.

This court has frequently held, that when parties have provided in their contract, in advance, that the quantity of work done, etc., shall be determined by an engineer or architect, his estimate is conclusive upon them, except for fraud or mistake. *Canal Trustees v. Lynch*, 5 Gilm. 526; *McAvoy v. Long*, 13 Ill. 147; *Mills v. Weeks*, 21 Ill. 561; *McAuley v. Carter*, 22 Ill. 53; *Parmelee v. Hambleton*, 24 Ill. 608; *Wallace v. Holmes*, 36 Ill. 156; *Korf v. Lull*, 70 Ill. 420; *Snell v. Brown*, 71 Ill. 133; *Covey v. Lehman*, 79 Ill. 173; *Taylor v. Renn*, 79 Ill. 181; *Downey v. O'Donnell*, 86 Ill. 49; *Finney v. Condon*, 86 Ill. 78; *Downey v. O'Donnell*, 92 Ill. 539; *Vermont Street. M. E. Church v. Brose*, 104 Ill. 206.

At common law all the executors were required to join in the execution of a power of sale, when it was not coupled with an estate, and it would not survive in case of the death of one. *Wardwell v. McDowell*, 31 Ill. 364; *Chnefetter v. Ayers*, 16 Ill. 329. In the first of these cases this court said: "At the common law it is not doubted that a naked power, such as this has been decided to be, not coupled with any interest in the thing or estate, could only be exercised by the joint action of the donees of the power. The power does not survive in case of the death of one of the donees. Sug. Powers, 129. So in the execution of a will, where one named with others, as executor, refused to accept and qualify, the others

could not execute the will." In *Sinclair v. Jackson*, 8 Cow. 533, the court say: "It is a settled rule, that when a trust or authority is delegated for mere private purposes, the concurrence of all who are intrusted with the power is necessary to its execution. *Green v. Miller*, 6 Johns. 39; *Franklin v. Osgood*, 14 Johns. 560; Sug. Powers, 162, 263." So under a submission of matters in dispute to arbitrators, their award must be unanimous, unless otherwise agreed. *Towne v. Jaquith*, 6 Mass. 46; *Maynard v. Frederick*, 7 Cush. 352; *Bunnister v. Read*, 1 Gilm. 92.

It follows that the finding of the rent by only two of the persons selected is not binding on the defendants. They never agreed to abide by such a finding. As the first count sought to recover the rent as fixed by only two of the referees, it was clearly bad, and the demurrer was therefore properly sustained thereto.

The demurrer to the second and third counts presents an entirely different question. These counts set forth the terms of the lease and the selection of the three persons, in accordance with the provision therein, and their inability or failure to agree as to the amount of the rent to be paid, and sought to recover a reasonable rental therefor.

It is evident that the parties contemplated the payment of a reasonable rent during the remainder of the term, and that the amount alone should be left to future adjustment. The parties might have left the amount of the future rent to be agreed upon by themselves. In that case, if they, after an honest attempt to do so, had failed to come to an agreement, the leasing would not have terminated, but the parties would have been left to show by proper evidence in the appropriate proceeding, what was a reasonable rental for the demised premises. What the parties could do themselves, they might do through their duly authorized agents. The persons selected to determine the reasonable rental may be regarded as their duly authorized special agents, deriving their powers from the instrument under which they were appointed. If they had all agreed, their award would have furnished the sole evidence of what was a fair and reasonable rent for the unexpired term. Failing after a *bona fide* attempt to make such adjustment, it is to be treated the same as a failure of the parties to agree, and the same results would follow. They may show by other evidence, what rent should be paid for the residue of the term. The very object of submitting the matter to the judgment of three disinterested persons was to dispense with the necessity of a resort to other evidence.

In *Phippen v. Stickney*, 3 Metc. 384, Stickney agreed, in case he became the purchaser of a tract of land, to convey a portion of it to Phippen on such terms as they might afterward agree upon, or upon such terms as the witnesses to the written agreement should decide to be just and reasonable. The contract was duly executed by the parties and attested by three witnesses. The parties failing to agree, the three witnesses were brought together, and the parties had notice. Two of them agreed upon and signed a finding, that Phippen should pay to Stickney \$180 for the land he had agreed to convey, but the third, who was present, did not agree, and refused to sign the same. The defendant having refused to perform the award and convey, suit was brought against him on his agreement. The court there said: "The only remaining objection is, that the plaintiff is not entitled to recover, because there has been no valid award made by the persons agreed upon by the parties fixing the sum to be paid by the plaintiff to entitle him to a conveyance from the defendant. The objection is, that of the three arbitrators, selected by the parties, two only concurred in the award. This would constitute a valid objection to an action on an award on a submission, at common law, there being no stipulation that a majority should decide. The question arises here however under different circumstances, the plaintiff founding his cause of action on the promise of the defendant to convey to him the land. In a case like the present, it appears that the plaintiff has done all in his power to procure an award fixing the amount to be paid by him, in pursuance of the terms of the contract. We do not think that the act of any one of the persons thus selected as arbitrators, in refusing to concur with his associates in fixing the sum to be paid, should operate to divest the rights of the plaintiff arising under this contract. If the sum to be paid by the plaintiff, before he was entitled to the conveyance, could not be adjusted in the manner contemplated by the parties, and this state of things occurred without the fault of the plaintiff, the effect must be that he must pay for the land such a sum as was reasonable, and such sum as the arbitrators ought to have awarded."

In *Hood v. Hartshorn*, 100 Mass. 120; s. c., 1 Am. Rep. 89, a lease for five years contained a clause that at the expiration of the term the building erected by the lessee should be appraised by three disinterested men, one to be chosen by the lessor and one by the lessee, and the third by the two thus chosen, and that the lessor should pur-

chase the building at the price set by such appraisers. The appraisers so selected neglected and refused to set a price for the buildings. That court says: "This clause is to be construed with reference to its subject matter. By its terms the appraisement was not to be made until the expiration of the lease. This would give no time for the removal of the buildings in case the appraisers should fail to agree, and by operation of law they would become the property of the lessor without any conveyance or transfer. It would be unreasonable to construe the agreement so as to render the obligation of the lessor to pay for them entirely dependent upon the making of an appraisement. The appraisement is to be regarded as a mere method of ascertaining the price to be paid for them. Yet the stipulation is not void. It gives the lessor certain rights, which are preliminary to the right of the lessee to maintain an action for the price. It binds the lessee to do all that was reasonably in his power to procure the stipulated appraisement." The court say that case is unlike that of *Phippen v. Stickney* in this, that there the referees were named, and when they failed to make an appraisement, the stipulated method of ascertaining the value wholly failed, there being no obligation resting on either party to appoint other appraisers, and hold that when those selected failed to agree others should be selected. But the court also hold that it was a question of fact for the jury to decide, whether the lessee had reasonably done all he could do on his part to fulfill the contract and procure the appraisement.

There is no provision in the lease before us for the selection of other referees in case those first selected failed to agree, and we cannot say, as a matter of law, that such an act is a condition precedent to the plaintiff's right to recover rent. The plaintiff has done all that the written contract required him to do, unless we, by construction, annex terms and conditions thereto other than the parties saw fit to incorporate. If he is required to select a second time, on a failure of those first chosen to agree, how many times must appraisers be selected? The courts cannot make contracts for the parties, but can only construe them as made. If the plaintiff should select another appraiser, there is nothing to prevent the defendants from selecting the same person they did before. If they did so, it could not be held to be a breach of the contract. It might have been more satisfactory if the contract had provided that the determination of a majority should be binding; but the parties

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did not so contract, and while we cannot require the defendants to accept the finding of only two of the referees, neither can we require the plaintiff to seek the appointment of other referees before he can maintain his action.

It would be an easy matter for a party owing money, when the amount to be paid depended upon the unanimous finding of referees or appraisers, to indefinitely postpone a right of action against him, if we should make such finding a condition precedent to a recovery. He might select a referee unduly prejudiced against the other party, and yet it be impossible to show bad faith or collusion with his appointee. The facilities, afforded an unwilling party to defeat an adjustment of this kind, are such that we are not disposed to require a party entitled to recover pay for the use of his property, to make any further effort to procure an appraisal or award than the parties have themselves required. If the plaintiff had refused to select a referee, and had thus prevented the fixing of the rent for the unexpired term, this would not of itself have terminated the lease, but it would have authorized the defendants to rescind the contract. They would not be bound to hold the premises at an uncertain rental. But if they should not choose to rescind the contract, and hold the premises to the end of the term, can they hold free of any obligation to pay rent for the four years? We think not. If then they continued to occupy the premises after a failure to fix the rent in the mode agreed upon, without the fault of either party, they should be required to pay a reasonable rent therefor.

In *Low v. Brown*, 22 Ohio St. 463, which was in equity, it was stipulated in an indenture by which a building lot was leased for ninety-nine years, renewable forever, that at the expiration of each successive period of twenty years the ground should be re-valued by three disinterested men, one to be selected by the lessor, one by the lessee, and the third by the two thus chosen, who should appraise the same at its true value, and report the amount in writing, and that eight per cent thereon should be the annual rent for the succeeding twenty years. The appraisers thus chosen could not agree, only two of them made an appraisal. The court held: First, in order to a valid execution of the power, the appraisers must all unite, and that a majority could not make a valid report; second, if they could not agree, and two of them only made a report of their appraisement, and one party to the lease refused to

select new appraisers in accordance with its provisions, the other party might bring his action to set aside such invalid report, and for the valuation of the leasehold ground, that in such action the court might refer the case to the master to take testimony, and report therewith the true value of the ground. The court further say: "The power of the court, after the appraisement was declared to be invalid, to order a re-appraisement in the mode provided in the lease may well be questioned. For it is said to be a well-settled principle of equity jurisprudence, that a court of equity will not enforce the specific performance of an agreement to refer any matter in controversy between adverse parties to arbitrators. *Conner v. Drake*, 1 Ohio St. 166. It is quite apparent from the record, that an appraisement in the mode prescribed in the lease could not have been effected without the exercise of such a power in both respects."

This court has held that when the parties to a contract make an architect an umpire to settle all disputes, and agree that his decision shall be final, payment to be made on condition that the architect shall certify to the amount due, they will be bound by the agreement, and that unless the architect acts in bad faith, refuses to act, or is prevented from acting from unforeseen or uncontrollable cause, no action can be maintained for extra work, without his certificate. But when the architect refused to act, and wrote on the back of the account presented by plaintiff to him, "I * * * most respectfully decline to further try to adjust the differences between the parties in interest," it was also held, that the plaintiff "had a right to sue, without making further effort to get the architect to make a settlement, and give a certificate of the amount due." It would seem therefore that when the plaintiff in this case had done all that he was required to do, under the contract, to fix the rental value of the premises, and failed, without fault on his part, his right to sue for and recover a reasonable rent as it should fall due is sustained, both upon principle and by authority.

The point is made by the defendants, that the rent for the four years after May 1, 1844, does not fall due until the end of the term. This depends upon the proper construction of the lease, taking all its parts and provisions into consideration. It will be seen that, for the first year of the term the rent was payable monthly in advance, and for the next five years at an increased rate, likewise payable monthly in advance. The rent for the last four years of the term

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was to be fixed and agreed upon by three disinterested parties, to be selected as provided in the lease. If the rent for the last four years was not due until the expiration of the term, there was no reason for selecting appraisers before that time, as the fair rental could at the end of the term be better known than four years before. The parties, by selecting the appraisers before May 1, 1884, have given a construction to the terms of the lease at variance with that now contended for by the defendants. But aside from this, it is evident that both parties contemplated payment of the rent monthly. They understood it to be payable in advance, and the object of selecting the appraisers was to furnish evidence of the amount to be paid each month of the unexpired term, in advance. It would be strange that plaintiff should require the rent paid with such particularity for the first six years, and should contract for the use of his property for the last four years without any security. Taking the lease as a whole, the conduct of the parties, and the nature of the property, into consideration, we have no hesitation in holding that the rent for the entire term was intended to be payable monthly in advance.

We think the court below erred in sustaining the demurrer to the second and third counts in the declaration. As said in *Hood v. Hartshorn, supra*: "The stipulation for an appraisal of the rental value was not void, but gave the lessees certain rights preliminary to the plaintiff's right of recovery." It therefore became necessary for him to show that he had taken all the steps required of him by the terms of the lease, to have the rent fixed by appraisers, and the failure to have it thus fixed, in order to entitle him to recover what was a reasonable rent per month of the premises. It was necessary for him to show a valid reason for not procuring the stipulated appraisal, before he could be allowed to introduce other evidence.

The judgment of the Appellate Court and that of the Superior Court are reversed, and the cause remanded to the Superior Court of Cook county for further proceedings.

Judgment reversed.

ENDSLEY V. JOHNS.

(120 Ill. 402.)

Fraud — fraudulent representations by agent — liability without benefit.

One purchasing cattle through an agent, intrusted him with his check signed in blank, and the agent filled the blank, and induced the seller to accept it in payment by the false and fraudulent representation that the check was good, the seller knowing nothing of the purchaser's financial ability or of the value of the check. The check proving worthless, *held* that the agent was liable to the seller in damages, although he derived no benefit from the deceit and did not collude with the purchaser.*

ACTION of damages for fraud. The head-note states the facts sufficiently. The plaintiff had judgment below.

Palmers, Robinson & Smith and Golden & Fryer, for appellant.

Wiley & Neal and Horace S. Clark, for appellee.

SHOPE, J. This was an action on the case, for fraud and deceit, brought to the Circuit Court of Coles county, resulting in a verdict and judgment for the plaintiff. On the defendant's appeal, the Appellate Court for the third district affirmed the judgment, and on his further appeal the case is brought to this court.

[Minor points omitted.]

The next objection is to appellee's sixth instruction, which told the jury, that if a person makes an untrue statement to another, knowing it to be untrue, and the person to whom it is made has no knowledge of its untruth, but relied on such statement as true, and acted upon the same and was injured thereby, then the person making such statement is liable for the damages accruing to the party thus acting. This, it is urged, is an incorrect statement of the rule of law applicable to cases of this character.

The right of one damaged by the false representations of another, made with intent to deceive, and known to be false, to have his action on the case for deceit, notwithstanding the offender was not benefited by the deceit, and did not collude with the person benefited, must be regarded as established. The leading case upon this subject is *Pasley v. Freeman*, 3 T. R. 51. It is also found in 2 Smith

* See *Chrysler v. Canaday* (90 N. Y. 272), 43 Am. Rep. 166.

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Lead. Cas., part 1, page *66, to which is added an extended note, wherein all the English and American cases are grouped, and to which particular reference is made. The principle was first adopted and announced by this court in *Weatherford v. Fishback*, 3 Scam. 170, on the authority of the leading case of *Pasley v. Freeman*, and *Upton v. Vail*, 6 Johns. 181; *Barney v. Dewey*, 13 Johns. 224; *Young v. Covell*, 8 Johns. 23; *Foster v. Charles*, 6 Bing. 396, and *Corbett v. Brown*, 8 Johns. 33. And it was there said: "The fraud and the scienter, though the party had no personal interest in practicing it, seem to constitute the ground of the action—the gravamen being the deceit, and the scienter the gist of the action." The same principle has been recognized in *Eames v. Morgan*, 37 Ill. 260; *Wheeler v. Randall*, 48 Ill. 182; *Hiner v. Richter*, 51 Ill. 299; *Merwin v. Arbuckle*, 81 Ill. 501, and other cases.

In discussing this instruction, the Appellate Court aptly said: "The ground of action is fraud and damage. There must be scienter, a misrepresentation, and a consequent loss. Fraud includes an intention to deceive. If there is no such intention, the party honestly giving his own opinion, believing he is stating the truth, is not liable, though the statement be wholly untrue. Where however he knowingly states what is untrue, a fraudulent purpose must be inferred; and when the statement relates to the matter inquired of and being relied on necessarily brings damage to the person so misled, he having no knowledge of its untruth, the action will lie."

But it is urged that this instruction is fatally defective because it ignores the principle that the plaintiff, before he can recover, must exercise ordinary prudence to guard against the deception and fraud practiced upon him, unless he has been thrown off his guard by the other party, citing *Schwabacker v. Riddle*, 99 Ill. 343. We cannot adopt the construction sought to be placed on the *Schwabacker* case, by counsel, nor admit its application to this case. Counsel lose sight of the marked distinction, clearly recognized by the authorities, between the representations made by the vendor to the vendee, and those made by a third party. As between vendor and vendee the general rule is, that false assertions respecting value are not actionable, upon the principle that value is, at most, an opinion, and the antagonistic position of the parties is sufficient to put the vendee upon his guard. The vendor may praise his property, and place a value upon it exceeding what he may know it to be worth, and try to induce its purchase on the basis of such valuation, without incur-

ring liability as for deceit. But when he leaves the domain of judgment and opinion, and falsely asserts a fact, as of quantity, grade, boundary and the like, inducing reliance and action thereon by one, without knowledge of the falsehood, or the present opportunity or ability of verification, and under circumstances justifying belief, and damage results in consequence, the action will lie. The *Schwabacker* case was between vendor and vendee, and the representations were in respect of the amount of goods belonging to a firm, shown by an invoice and valuation by disinterested persons; and the doctrine of that case is, that under such circumstances the plaintiff must not allow himself to be blindly credulous of a fact the means of verification of which was at hand and available to him. But the principle controlling where the relation of the parties is that of vendor and vendee can have no application where the representation complained of, as in this case, is made by a third party as to the character and credit of another, or asserting another's solvency or reliability. The position of the parties is not antagonistic, rather one of confidence. In such case, if the material representation is knowingly falsely made to one ignorant of its falseness, under circumstances justifying a reasonably prudent man's belief, and it is believed and acted upon with consequent injury, an action therefor will lie, and this we understand to be in harmony with the current and weight of American decisions where the doctrine of *Pasley v. Freeman* has been accepted.

It may therefore be laid down as a general proposition, deduced from a consideration of all the authorities, that where the representations relate to a material fact within the knowledge of the person making them, or which he assumes to assert upon his personal knowledge, and with respect to which the person to whom the representations are made has not the present opportunity or ability to test or verify, the latter has a right to rely upon such representations and in the absence of facts apparent to reasonably arouse suspicion and throw doubt upon the truth of the statements, he is not bound to go further and make inquiries in respect thereof.

Applying these principles to the instruction under consideration, and in view of the facts disclosed by the evidence, the law of the case was stated with substantial accuracy. Endsley knew Kimlin's financial condition — knew that he had no money in the Kansas

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bank, knew that Johns was ignorant of Kimlin's insolvency, and yet by his representations he induced Johns to part with his property and deliver its possession to him for Kimlin, and to accept a worthless check in payment therefor. Under such circumstances Johns had a right to rely upon Endsley's statement that the check was good and would be paid, and to act upon it as he did.

Finding no error in the record, the judgment of the Appellate Court is affirmed.

Judgment affirmed.

TRUSTEES OF SCHOOLS V. SCHROLL.

(120 Ill. 500.)

Water and water-courses—lake—riparian rights on.

A body of fresh water five or six miles long, a mile wide in some places, fed by springs, having no connection with any stream except by a slough which is dry in summer, and without any natural current, is a lake, and riparian owners on it have no title to the soil beyond the water's edge.

SUIT to recover land. The opinion states the case. The defendant had judgment below.

Cullon & Essler, for appellant.

Morrison & Whitlock, for appellee.

SHOPE, J. Fractional section 16 was, by the United States, "granted to the State, for the use of the inhabitants of such township, for the use of schools." Enabling act of Congress, April 18, 1818, 3 U. S. Stat. at Large, 428; Organic Laws of Illinois (1 Gross Stat.), 19. And this enabling act was formally accepted by an ordinance of the Constitutional Convention of August 26, 1818. Laws of Illinois, 1819, appx. 21; Organic Laws of Illinois (1 Gross Stat.) 20. The enabling act and ordinance constituted, as this court held in *Bradley v. Case*, 3 Scam. 585, a solemn compact between the United States and this State, whereby the State of Illinois became the purchaser of the school sections, for a valuable consideration, with full power to sell or lease the same for the use of schools, as the State might provide and think most beneficial to the inhabitants of the respective townships.

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Sections 16 in the several townships in the State having been granted and accepted as above stated, were not public lands, within the act of Congress of March 30, 1832, 3 U. S. Stat. at Large, 659, authorizing the State "to survey and mark through the public lands of the United States, the route of the canal connecting the Illinois river with the southern bend of Lake Michigan. *Canal Trustees v. Haven*, 5 Gilm. 548. And for the like reason we must hold that they were not "swamp and overflowed lands, made unfit thereby for cultivation," remaining "unsold at the passage of" the act of Congress of September 28, 1850, 9 U. S. Stat. at Large, 519, being "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits." After the grant in 1818 they ceased to be public lands of the United States, nor could they after that time be regarded as unsold lands, and so they were unaffected by the Swamp-land Act. When therefore the defendants in this case offered in evidence the deed of the county clerk of Morgan county, purporting to have been made by order of the county board of that county, on the authority of the laws of this State relating to swamp and overflowed lands, and to convey parts of this school section the offer should have been denied, and it was error in the Circuit Court not to have sustained the plaintiff's objection. And this is so, independent of all questions as to whether the uncertain and defective description of the premises, said to be part of this particular section, rendered the deed inoperative to that extent, or whether the premises attempted to be conveyed formed any part of the lands sued for or bounded thereon. When therefore the official character of appellants was admitted, and the enabling act and ordinance of acceptance had been offered in evidence, appellants' right of recovery was complete, unless it could be shown that the State had parted with the title to the lands described in the declaration, or that the township authorities had parted with or lost their right of possession in the same.

It is contended by appellees that Meredosia lake is a stream of water, some five miles in length, and emptying into the Illinois river, and that appellants, by the proper officers, having platted and sold the land to the margin of and bordering on the stream, the grantees took to the middle of the stream; that the title of such grantees is an outstanding title, and appellees being shown to be in possession under such grantees, rightfully prevailed in the Circuit Court and ought to prevail here. The books and authorities are

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all agreed that streams and bodies of water within the ebb and flow of the tide are at common law navigable, and the riparian proprietor's title does not, speaking generally, extend beyond the shore. And it is equally well settled that grants of land bounded on streams or rivers above tide water, carry the exclusive right and title of the grantee to the center of the stream, *usque ad filum aquæ*, subject to the easement of navigation in streams navigable in fact, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the stream. 3 Kent Com. 427; 2 Hilliard Real Prop. 92; Angell Water-courses, § 5; *Jones v. Soulard*, 24 How. 41; *State v. Milk*, 11 Fed. Rep. 389; *Canal Appraisers v. People*, 17 Wend. 596; *Chilf v. Starr*, 4 Hill, 369; *Seaman v. Smith*, 24 Ill. 521; *Rockwell v. Baldwin*, 53 Ill. 19; *Braxton v. Bressler*, 64 Ill. 488; *Washington Ice Co. v. Shortall*, 101 Ill. 46; s. c., 40 Am. Rep. 196. But an entirely different rule applies when land is conveyed bounded along or upon a natural lake or pond. In such case the grant extends only to the water's edge. Angell Water-courses, §§ 41, 42; 3 Kent Com. *429, note a, — citing *Bradley v. Rice*, 13 Me. 201 and *Waterman v. Johnson*, 13 Pick, 261. See also *Warren v. Chambers*, 25 Ark. 120; *State v. Milk*, 11 Fed. Rep. 389, — citing *Wheeler v. Spinola*, 54 N. Y. 377; *Mansur v. Blake*, 62 Me. 38; *State v. Gilmanton*, 9 N. H. 461; *Paine v. Wood*, 108 Mass. 160; *Fletcher v. Phelps*, 28 Vt. 257; *Austin v. Rutland Railroad Co.*, 45 Vt. 215; *Boorman v. Sunnucks*, 42 Wis. 233; *Desplaines v. Chicago & North-western Ry. Co.*, 42 Wis. 214; and *Seaman v. Smith*, 24 Ill. 521. See also *Nelson v. Butterfield*, 21 Me. 229; *West Roxbury v. Stoddard*, 7 Allen, 158; *Canal Co. v. People*, 5 Wend. 423; *Jakeway v. Barrett*, 38 Vt. 316; *Primm v. Walker*, 38 Mo. 99; *Wood v. Kelley*, 30 Me. 47.

The line of defense adopted by appellees, as before stated, presupposes the existence of certain facts, viz.: First, that appellants, being owners of section 16, granted the lands abutting upon the water spoken of as Meredosia lake, within such section, bounding such grants along or upon the margin of such water; second, that Meredosia lake is not, at the common law, navigable; third, that Meredosia lake, and within the bounds of section 16, is a stream or river, as contradistinguished from a lake; and fourth, that the terms of the grant do not clearly denote an intention to stop at the edge or margin of the stream. If the record in this case shows the existence and concurrence of all these facts, this

judgment, upon the authority of the cases cited, may be affirmed; but if it shall appear that the case made by the record does not show the existence of the supposed facts, reversal must follow.

It is not pretended that Meredosia lake is a stream or body of water navigable at common law — that is to say, it is not within the ebb and flow of the tide — and hence the rules of law applicable in such case cannot be invoked. The contention is, that Meredosia lake is a stream of water about five miles long, emptying into the Illinois river, with its southern extremity and outlet within the bounds of section 16.

A careful examination of the record shows that this lake is a natural body of water, five or six miles long, and in some places a mile in width; that it is fed by springs; that its southern extremity extends into section 16; that it has no connection with any stream of water, except by a slough at the south end, and near the south line of section 16; that the body of the lake, in its natural state, is without current, but that during portions of the year a current of water passes from the lake, through the slough referred to, into the Illinois river, which flow however is stopped in the summer. The record does not show the average width of the lake, the average depth of the water in the lake in its natural state, nor whether or not it is in fact navigable, nor are we able to learn therefrom the length and width of the slough, nor the depth of the water flowing through the same, or the rapidity of the flow from the lake into the river at the natural stage of water in the lake. All we can know of this outlet we must gather from the plat made by the township trustees in 1846, taken in connection with the fact testified to by witnesses, that for a portion of the year some water from a land-locked natural body of currentless water, five or six miles long, and in places a mile in width, flows therethrough, and from this alone we are asked to find and hold that such a body of water so situated is a stream, and not a lake. This, as we understand the law, we cannot do.

The word "stream" has a well-defined meaning, wholly inconsistent with a body of water at rest. It implies motion, as to issue in a stream — to flow in a current. (Webster's Dictionary.) Indeed the controlling distinction between a stream and a pond or a lake is, that in the one case the water has a natural motion — a current — while in the other the water is, in its natural state, substantially at rest. And this is so, independent of the size of the one or the

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other. The flowing rivulet of but a few inches in width is a stream as certainly as the Mississippi. And when lands are granted by the proprietor of both land and stream, bounding such grant upon the stream, the grantee acquires right and title to the thread or middle of the stream. This right is grounded upon the presumption that the grantor, by making the stream the boundary, intended his grantee to take to the middle of the stream; and this presumption will prevail until a contrary intent is made to appear. *Rockwell v. Baldwin*, 53 Ill. 19. The right spoken of does not rest upon the principle that when a grant is bounded on a stream, the bed of the stream to the thread or middle passes as incident or appurtenant to the bordering land, for the bed of the stream is land, though covered with water, and land cannot pass as appurtenant to land. As is said in *Child v. Starr*, 4 Hill. 369: "A conveyance of one acre of land can never be made, by any legal construction, to carry another acre by way of incident or appurtenance to the first. The riparian proprietor claiming to the thread or middle of the stream must show the bordering water to be a stream, and that his grant, in terms or legal effect, is bounded upon or along such stream — that the stream is made the boundary. And while it is obvious that a currentless body of water cannot be a stream, the fact of some current in a body of water is not of itself, in every instance, sufficient to determine its character as a stream, as distinguished from a pond or lake. The presence of some current is not enough, alone, to work an essential change in so essentially different things as a stream and a lake, for a current from a higher to a lower level does not necessarily make that a stream or river which would otherwise be a lake; nor the swelling out of a stream into broad water sheets does not necessarily make that a lake which would otherwise be a river. Angell on Water-courses, § 4.

We are therefore constrained to hold, that the position, size and character of this body of water, as shown by this record, fixes its character of a lake, and not a stream, notwithstanding some part of its water, during a portion of the year, may flow through the slough into the Illinois river.

[Minor matters omitted.]

The judgment of the Circuit Court is reversed and the cause remanded.

MEYERS V. BAKER.

(120 Ill. 567.)

Constitutional law — prohibiting refreshment-stands near camp-meetings.

A statute making it penal for any one, without the permission of those in charge of a camp meeting, to establish any tent, booth or place for vending provisions or refreshments within one mile of such meeting, with a proviso that any one who has his regular place of business within such limits shall not be required to suspend his business, is not invalid.*

ACTION for false imprisonment. The opinion states the point. The defendant had judgment below.

Wm. G. Randall and Hopkins & Hammond, for appellant.

Martin L. Newell, for appellees.

CRAIG, J. The decision of this case hinges upon the validity of the following section of our Criminal Code: "Whoever, during the time of holding any camp or field meeting for religious purposes, and within one mile of the place of holding such meeting, hawks or peddles goods, wares or merchandise, or without the permission of the authorities having charge of such meeting, establishes any tent, booth or other place for vending provisions or refreshments, or sells or gives away, or offers to sell or give away any spirituous liquor, wine, cider or beer, or practices or engages in gaming or horse racing, or exhibits or offers to exhibit any show or play, shall be fined not exceeding \$100 for each offense, provided, that whosoever has his regular place of business within such limits is not hereby required to suspend his business." Rev. Stat., chap. 38, § 59.

Meyers, the appellant, and the Normal District Camp Meeting Association of the Methodist Episcopal Church, each own adjoining lands within the incorporated village of Eureka, in Woodford county. The appellant purchased his premises about two years before the camp meeting association purchased its premises, but appellant did not occupy his premises until after the association purchased its grounds and held meetings thereon. When the meeting commenced, appellant lived on his premises, but he had never

* See *Com. v. Beare* (122 Mass. 542), 42 Am. Rep. 450.

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kept a booth thereon. After the camp meeting commenced, appellant established his booth, and commenced the sale of his goods, without the consent of the association. Whether he had the right to do so depends upon the validity of the law.

In the argument of appellant it is said: "We apprehend that an act in restraint of trade, or one erecting and vesting a business monopoly, or one creating discriminations between citizens transacting the same lawful business, or one vesting taxing power in private individuals, corporations or associations, for their own benefit, or one vesting in individuals or associations, or private corporations, power to license trades or business, for their own benefit, would also be beyond the competency of the legislature, * * * and all these we claim the statute in question attempts to do."

The argument that the act is in restraint of trade, one creating a monopoly and making discriminations — is based upon the proviso in the act declaring "that whosoever has his regular place of business within such limits is not hereby required to suspend his business." We do not think that the proviso, upon a fair construction of its terms, is liable to the objection urged against it. If it was intended, by the proviso, to protect any person who might have a business within the designated limits at the time the act was passed, and not afford protection to any person who might engage in regular business, within the designated limits, after the passage of the act, there might be much force in the position of appellant; but we do not understand that such is the meaning of the proviso. But on the other hand, we think the manifest intention was to allow any person who might think proper to establish a place for the vending of provisions or refreshments within the designated limits, at a time when the camp meeting was not in progress, and after such person became established in a regular business he would not be required to suspend his business during the time the camp meeting was held; in other words, we think the word "has" in the proviso, should be read "may have." The proviso would then read, "whosoever may have his regular place of business within such limits is not hereby required to suspend his business." Under this construction, no privilege or right is conferred on one which is not granted to all. No monopoly is created by the act, which protects the one and excludes the other, but all persons stand upon an equality under the law, as they should. All who desire may establish a regular

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place of business not temporary, but permanent. We do not hold that a person, on the eve of a meeting being held, would have the right to establish a booth or place for selling provisions or refreshments for a short period, or during a session of the camp meeting, and claim protection under the statute, as this would be a device to defeat the purpose of the law which could not be sanctioned; but in order to be protected, whoever undertook to avail of the law would have to establish a regular, permanent business, and after such regular business was established, the person engaged in such regular business would not be required to suspend during the session of a camp meeting.

Tugman v. City of Chicago, 78 Ill. 405, has been cited as an authority sustaining appellant's view. In that case it was held: that an ordinance which prevents one citizen engaging in a particular kind of business in a certain locality, under a penalty, whilst another is permitted to engage in the same business in the same locality, is not only unreasonable, and therefore void, but its direct tendency is to create a monopoly, which the law will not tolerate. Of course, the rule which would control any ordinance would also apply to an act of the legislature, and if the proviso of the act in question protected persons who might be in business when it was enacted, and excluded those who might afterward engage in business the case cited would be in point; but as said before, that construction cannot be placed on the law.

It is also said, that vendors of provisions and refreshments cannot under the Constitution be taxed, and that the act empowers the authorities in charge of the meeting to license, which in fact is a tax. As we understand the statute, it does not confer the power to license on the authorities in charge of the meeting. The act merely declares, that whoever, during the time of holding any camp or field meeting, without the permission of the authorities having charge of such meeting, establishes any tent, booth or place for vending provisions or refreshments, within a certain distance of the meeting, shall be fined. The fact that the act confers on the authorities the right to consent, or refuse consent, cannot be held to authorize such authorities to license. The right to consent, or refuse consent is one thing, while the right or power to license, a person to conduct a certain business at a certain place is quite a different thing. Had the legislature intended to authorize the authorities to license, language expressing that intention in

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plain words would no doubt have been used. But however this may be, we see nothing in the language of the act which can be construed as authorizing the authorities to license. The act is a mere police regulation. The purpose of the act is to preserve order and prevent the disturbance of those engaged in public worship. For many years we have had similar acts in our statute. Section 147 of the Criminal Code of 1845 is an act of a similar character, one enacted as a police regulation, to prevent a disturbance of a religious congregation. There is in our judgment no question in regard to the power and authority of the legislature to pass such laws. The tendency of such laws is to prevent disturbance and disorderly conduct, and preserve peace and quiet, where a large number of people are assembled for religious worship. The statute is a mere police regulation, one which the legislature had the right to enact. We regard it valid, and free from the objections urged against it.

The judgment will be affirmed.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
AND
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

CURTIS V. AARONSON.

(20 N. J. Law, 68.)

Evidence — as to boundaries — reputation.

Declarations as to boundaries, by a deceased person who was never the owner of the premises, and not made in the performance of any act in respect to such boundaries, are inadmissible in evidence. (*See note, p. 589.*)

TRESPASS *quare clausum fregit*. The opinion states the point.
C. E. Hendrickson, for plaintiff.

Jos. H. Gaskill and M. R. Sooy, for defendants.

KNAPP, J. This action was trespass *quare clausum fregit*. The contest at the trial was over the true location of the southerly boundary line of a tract of land known as the Abram Jones including survey, the plaintiffs claiming it to be so far south as to include the *locus in quo*, the defendants claiming it to be further north and running so as to exclude from the boundaries of said survey the

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lands upon which the cutting was done and which they claim under a later survey, known as the Heisler survey. The parties to the controversy are agreed as to the beginning point of the Jones survey, and on the lines of course to the end of the fifteenth course, and the termination of that course at an established monument described in the survey as a pine tree by Egg Harbor road, marked in letter W. The corner is now described by a small stone marked with letters O N at the foot of the pine tree. From this monument the survey calls for its sixteenth course—south, twenty-four degrees east, twenty-nine chains to a corner; then seventeenth, south, sixty-five degrees and fifteen minutes west, one hundred and fifty-one chains and fifty links to a pine tree marked letters A I, standing on the east side of a branch called Shoal branch; thence down the several courses thereof, etc.

[Omitting further statements and minor points.]

The third class of exceptions relates to the overruling and withdrawal from the jury of the evidence of declarations of deceased persons with reference to the corners and boundaries in dispute in the case. The ground of the exclusion of this testimony was that such declarations were made after controversy had arisen touching the questions at issue in that suit.

The testimony shut out under this ruling was hearsay, and would, on that ground, have been properly excluded under the general rule against the admission of hearsay evidence, unless it comes under some exception permitting testimony of this character in matter of boundaries.

James Lippincott, one of the witnesses, was allowed to testify that Thomas Haines and Joseph R. Hulme had conversed with witness about thirty years before the trial, concerning the location of the A I monument. And Hulme, in the conversation with him, stated that the A I stone (claimed by plaintiff) was a corner of the Jones mill survey. That Haines, in the conversation with witness had with him, "told him the same in substance, that the A I stone was a corner to the original Abraham Jones survey." There was other testimony of the same character. Neither Hulme nor Haines was ever the owner of or in possession of the land in controversy. The conversation related was not on or near the lands, nor while declarants were engaged in any act concerning the disputed line or corner. The testimony was received under the defendant's objection that it was hearsay evidence.

If the evidence received was competent proof of the fact declared by these aged persons, it covered a very important point of inquiry in the case.

There was no possibility of disproving the declarations; and the defendants were bound up to their unqualified acceptance, without power to go deeper, by cross-examination, than the circumstances attending the conversation which evolved the statement.

It is said, on behalf of this evidence, that it is admissible under an exception to the general rule excluding hearsay, which permits proof of boundaries by ancient reputation.

Such declarations seem to me not to belong to that class of evidence.

It is familiar practice to receive evidence of the declarations of parties in the possession of lands as owners, made against their interest, to bind such owner and those claiming under them. *Van Blarcom v. Kip*, 2 Dutch. 351; *Horner v. Stillwell*, 6 Vroom, 310.

The declarations of such owner when engaged in pointing out his boundaries, as well as the declarations of surveyors and others acting in the same manner under competent authority, would be admissible when the act was one relevant in proof, as of the *res gesta*, if such declaration gave character to the act proved. But the practice of receiving evidence like this in question, on deliberation, in our trial courts is unfamiliar, and we are unable to find any authority for its admission in the reported cases in our State. *Ten Eyck v. Runk*, 2 Dutch. 513, is a decision against it.

Some countenance for its admission is claimed, under the language used by Chief Justice GREEN, in deciding *Opdyke v. Stephens*. "Boundaries," he says, "may be proved by every sort of evidence that is admissible to prove any other fact; actual occupation, ancient reputation, the admission of the party in possession against his interest, etc." Doubtless proof of boundaries by ancient reputation has a place in the law of evidence. But the learned chief justice was not then attempting to point out the conditions requisite to the admission of such evidence.

The admissibility of evidence of common reputation, to prove ancient facts of a public or *quasi* public nature, is a recognized exception to the rule excluding hearsay evidence.

In England, on questions of ancient public boundary, this source of evidence was commonly resorted to. Knowledge of such public matters was supposed to rest in the possession of the public, because

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of their interest therein, and in any litigation touching such subject the parties to it had a common resort for ascertaining the truth. And there it has not been infrequent, where private lines in dispute were coincident with public or *quasi* public boundaries, to admit evidence of reputation in determining the private right.

The rule, to the same extent, has general prevalence in the States of this country. 1 Greenl. Ev. 145; Whart. Ev., § 185; *Regina v. Bedfordshire*, 4 E. & B. 535.

No such exception to the general rule has ever been recognized in England in respect to the determination of mere private boundaries, for the reason that such private interests could not be matter of knowledge with the public, or of any public interest or concern.

It has therefore been the course of the courts there to entirely exclude traditionary evidence in suits concerning private lines and monuments. *Outram v. Morewood*, 5 T. R. 121; *Didsbury v. Thomas*, 14 East, 323 and cases cited in note; *Clothier v. Chapman*, 14 East, 331; *Dunraven v. Llewellyn*, 15 Q. B. 791.

In some of the American States the rule excluding hearsay testimony is, in this line of fact, to some extent departed from, and traditionary evidence is received to establish private boundary. It has been permitted, under color of making proof by ancient reputation, to give the declarations of third persons, strangers to the title, made when not engaged in any provable act, such declarations being recitals of past acts and doings of the declarant, or expression of opinion on matters exclusively pertaining to the rights of others. The reception of such evidence is confessedly in derogation of the established rules of evidence under our system, and is justified only on the ground of an alleged necessity. It is needless to cite these cases, as they are fully referred to in the text-books in common use. But the decided weight of authority in the country, and upon the solid ground of reason and principle, is against the admissibility of evidence of this character. The cases decided in the courts of Massachusetts illustrate and enforce what is believed to be the true rule. There traditionary proof is received in matters of private lines only when the boundary in question is a public or *quasi* public one, with which the private right is coincident.

Proof of declarations of persons since deceased, in respect to private boundaries, to be admissible in evidence, must have been made by a declarant in possession as owner at the time, and while engaged in pointing out the boundary in question, and such decla-

rations need not be against interest or in disparagement of title; they are received when nothing appears to show an interest to deceive or misrepresent. *Daggett v. Shaw*, 5 Metc. 223; *Barilett v. Emerson*, 7 Gray, 174; *Ware v. Brookhouse*, 7 Gray, 454; *Leng v. Colton*, 116 Mass. 414; Whart. Ev. 191.

The rule in Massachusetts is approved in the Federal courts. *Hunnicut v. Peyton*, 102 U. S. 333, 363.

It may not, in every instance, be readily determinable whether a disputed boundary is of such public character as to permit evidence of reputation concerning it. In the case of lines of counties, towns, townships, highways, large water-courses and the like, there can be no doubt. But there may be lines and monuments of a less marked public character, and yet by reason of their relation to numerous minor titles and land divisions, a local public interest may arise, and a consequent knowledge in the neighborhood concerning them may be readily supposed to exist. Such cases, it is believed, come within the rule.

But we think the subject-matter of investigation in this case is not shown to have such *quasi* public quality. It is strictly of a private nature.

In such cases, recitals of fact not made by one in possession as owner and qualifying such possession, not made by an owner against interest, not made by one in the performance under proper authority of some provable act in respect to such boundary, and qualifying and characterizing such act, but being the mere voluntary statement of a stranger, not under oath or in presence of parties, cannot, under any rule of reason or safety, be regarded as competent testimony upon which to determine private title to lands, and whether made *ante* or *post litem motam*, are equally objectionable and illegal; and while the courts of some States have, as it would seem, been willing to receive such testimony, in this State we have not gone so far.

The case of *Ten Eyck v. Runk*, cited above, decided in the Court of Errors of this State, in 1853, was supposed to have ruled adversely to the admission of this class of testimony in matter of private right. The case was decided when Chief Justice GREEN was a member of that court, and the language used by him in *Opdyke v. Stevens*, read in the light of this case, does not lead to the belief that he held a different view of the rule of evidence in question.

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The court below, in overruling the evidence of Lippincott and others of the class, committed no error, but the judgment should be reversed, and a new trial ordered, for error in the direction of the court below, above pointed out.

NOTE BY THE REPORTER.—See to the contrary *Whitehurst v. Pettipher*, 87 N. C. 179; s. c., 42 Am. Rep. 530. To the contrary also see *Smith v. Healdrick*, 93 N. C. 210; *Bethea v. Byrd*, 95 N. C. 809; s. c., 59 Am. Rep. 240; *Kinney v. Furnsworth*, 17 Conn. 353; *Merrian v. Ward*, 1 W. & S. 68; *McCausland v. Fleming*, 68 Penn. St. 36; *Sasser v. Herring*, 3 Dev. L. 840; *Beard v. Talbot*, 1 Cooke (Tenn.), 142; *Smith v. Nowells*, 2 Litt. 159; *Great Falls v. Worster*, 15 N. H. 412; *Wood v. Willard*, 37 Vt. 386.

"If no certain monuments can be found, nor any data to determine courses and distances, a lesser degree of testimony may be resorted to; and long-continued occupancy and acquiescence, even reputation and hearsay as to boundaries, may have weight." *Nye v. Biemaret*, 44 Wis. 104.

"That boundaries may be proved by hearsay testimony is a rule well settled." By McLEAN, J., *Boardman v. Lessee of Reed*, 6 Pet. 828.

In *Long v. Colton*, 116 Mass. 414, the court said: "In *Bartlett v. Emerson*, 7 Gray, 174, it is held that to be admissible such declarations must have been made by persons now deceased, while in possession of land owned by them and in the act of pointing out their boundaries, and when it appears to show an interest to deceive or misrepresent. The declarations offered and rejected at the trial do not come within the exception thus defined to the rule by which hearsay is excluded. The decisive objection to their competency is that they do not appear to have been made while in the act of pointing out the boundaries of the declarant's land. This is an element which cannot be disregarded, especially when the question is one of private boundary. The declaration derives its force as evidence from the fact that it accompanies an act which it qualifies or gives character to. The declaration does not appear to have been offered for the purpose of establishing a boundary by traditionary evidence or reputation. Such evidence has sometimes been said by American courts to be admissible; and in the cases from New Hampshire, cited by the defendant, it seems to be held that declarations of deceased persons, who from their situation appear to have had the means of knowledge, and who have no interest to misrepresent the facts, are admissible to establish private boundaries, although not made on the land. *Smith v. Forrest*, 49 N. H. 230, 237; *Great Falls Co. v. Worster*, 15 N. H. 412, 437. But by the current of authority and upon the better reason, such evidence is inadmissible for the purpose of proving the boundary of a private estate, where such boundary is not identical with another of a public or quasi public nature. 1 Greenl. Ev., § 143; 1 Phil. Ev. (N. Y. ed., 1849) 241, 243; Cowen & Hill's Notes; *Hall v. Mayo*, 97 Mass. 416."

Wharton (Ev., § 191) says, "such declarations should only be received when made coincidentally with pointing out boundaries, and by parties either performing business duties at the time or having no interest to subserve in making the declarations." Citing *Long v. Colton*, *supra*.

Greenleaf says (1 Ev., § 145): "By the weight of authority and upon better reason such evidence is held to be inadmissible for the purpose of proving the boundary of a private estate," etc.

In *Sasser v. Herring*, *supra*, HENDERSON, C. J., after declaring such evidence competent, upon authority, says: "And if the propriety of the rule was now *res integra*, perhaps the necessity of the case, arising from the situation of our country, and the want of self evident *termini* of our lands, would require its adoption. For although it sometimes leads to falsehood, it more often tends to the establishment of truth. From necessity we have in this instance sacrificed the principles upon which the rules of evidence are founded."

Wharton essays rather fancifully to reconcile the conflict of decision between this country and England, on the ground that "our boundaries go back, in the main, to proprietary or government grants or to purchase from the Indians," the interior as well as the exterior boundaries of which are shifting or imperfectly described, and in regard to which "the community took such an interest as made its common opinion of value as exhibiting not merely what the parties understood the boundaries to be, but what they really made the boundaries," and hence the reputation relates to matters of public interest.

Abbott says (Trial Ev., § 110): "In this country, the declarations of deceased persons who are shown to have been in a position to know the facts, are admissible to establish the boundaries of lands owned by private persons." "In most of the States it is not necessary that the declarant should ever have been in possession of the land as owner or otherwise." But the writer mistakenly cites *Hall v. Gittings*, 2 H. & J. 112, 121, to this, for that was the case of declarations of a former owner.

In *Tucker v. Smith*, Texas Sup. Ct., Feb. 25, 1887, it was said:

"It is well settled by our decisions that the declarations of disinterested parties, since deceased, who were in a position to know a boundary line, are admissible in a controversy about such line." But it appeared that the statements were made while the declarant was pointing out posts placed by the surveyor who ran the disputed line. But in *Hurt v. Evans*, 49 Tex. 811, it was held, without discussion, that declarations after suit, by a party never interested in the lands, are not competent to prove boundaries. In *Stroud v. Springfield*, 88 Tex. 649, the court said: "Evidence of this character, except where it was a part of the original *res gestae*, was not admissible at common law to prove the boundaries of a private estate. Its admission was restricted to cases involving questions of a general or public nature. The admissibility of this character of evidence seems to have turned upon the nature of the reputed fact, whether it were of interest to one party only or to many. If the latter, it was admissible; if the former, it was excluded. The tendency of American decisions has been to break in upon the rule of the common law, in reference to questions of private boundary, and to remove the restrictions which exclude evidence of this character in such cases. This has been the result of necessity. Our land marks are usually of perishable materials, and by the settlement and improvement of the country, and from other causes, they are constantly being destroyed. It is therefore indispensable in many cases that hearsay or reputation should be

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received to establish old boundaries. * * * There is a strong array of authorities which seem to support the common-law rule. But the courts of a majority of the States, it is believed, hold the same doctrine asserted in the cases I have cited from North and South Carolina. *Sample v. Robb*, 4 How. 307; *Sasser v. Herring*, 3 Dev. L. 340. * * * The rule that old boundaries may be proved by the common reputation and understanding of the neighborhood where the land lies, would seem better established, and to stand in principle on higher ground than the one we have been considering, which admits the declarations of deceased persons of competent knowledge and having no interest, as evidence. The admission of evidence of common reputation as to old boundaries, which frequently cannot possibly be proved by positive testimony, is based on the extreme probability of the truth of a fact received, assented to and acted on as true, by the common consent of a community having peculiar means for correct information, and no interest to warp their judgment in forming a correct conclusion. In the absence of positive and direct testimony, which when they are ancient cannot usually be had to establish boundaries, common reputation is perhaps as little liable to error as any other species of evidence that can be resorted to for the purpose, and indeed is frequently the only resort. The general rule is undoubted, that common reputation is admissible as evidence in questions of boundary, but there is much diversity of opinion as to its proper application. *Boardman v. Lussess of Reed*, 6 Pet. 341. The unrestricted admission of this species of evidence would be fraught with the most dangerous tendencies, and violative of the best dictates of experience. The admissibility, as well as the value and weight of general reputation, must from its nature depend very much upon the circumstances of the case in which it is offered. It cannot of course be received as to title. It is admissible only as to the *locus in quo* of the boundary, a fact of which the community or neighborhood around it is supposed to be peculiarly well informed. The boundary must be an ancient one, and its supposed locality must be of sufficient interest or note in the neighborhood or community to have been the subject of observation and conversation among the people. The reputation or understanding must be general and concurrent. There, weight of opinion or neighborhood report is not common reputation. The reputation or understanding must have been formed and in existence before the controversy commenced in which it is used as evidence. Men are not presumed to be indifferent in regard to matters in actual controversy, for when the contest has begun, people generally take one side or the other, and if they are disposed to speak the truth, facts are or may be seen by them through a false medium. For this reason, it is necessary that proof of common reputation must have reference to a time *ante litem motam*."

This is the most extended and the most excellent consideration of this question on principle that we have found.

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(49 N. J. Law, 94.)

Criminal law — nuisance — legislative authority.

A board of health, empowered by the legislature to regulate and control or prohibit the carrying on of offensive manufactures attended by noisome or injurious odors, has no authority to license the manufacture of fertilizers in such a way as to create a public nuisance.*

CONVICTION of maintaining a nuisance. The opinion states the case.

Babbitt & Lawrence and *Theodore Ryerson* for plaintiffs in error.

Charles H. Winfield, prosecutor of the pleas, *contra*.

KNAPP, J. The plaintiffs in error were convicted, on trial before the Quarter Sessions of the county of Hudson, of the offense of maintaining a public nuisance in the said county. Their business was that of extracting fats from dead animals, and converting the rest into fertilizers. It was established by the finding of the jury that the process of manufacturing created nauseous and offensive odors to an extent sufficient to create public annoyance. The plaintiffs in error had received a license from the board of health and vital statistics of the county of Hudson to carry on the business of manufacturing fertilizers, and they sought to vindicate their action in virtue of such license. This line of defense was distinctly presented in a request of the court to charge that "if the jury believe the board of health and vital statistics established in the county of Hudson has enacted ordinances on the subject of carrying on the business carried on by the defendants, and under such ordinances has licensed the defendants to carry on the business, this prevents an indictment for nuisance during the continuance of such license." This the court declined to charge, and charged that the fact of the license being granted did not prevent the indictment of the licensees of the board if they created and maintained a public nuisance. To this refusal of the request to charge, and to the charge as made upon that point, exceptions were duly sealed, and errors were assigned thereon. The action of the court thus excepted to presents the only

* To same effect, *Cogswell v. N. Y., etc., Ry. Co.* (108 N. Y. 10), 56 Am. Rep. 6.

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questions for consideration here. The board whose licenses the plaintiffs in error set up in their justification was created by an act of the legislature entitled "An act to provide for a board of health and vital statistics in the county of Hudson, and to prevent the spreading of disease," passed March 27, 1874. (Pamph. L. p. 569) It gave power to the board to enact ordinances in relation to the public health, not inconsistent with the laws of the State, and to impose a penalty for their violation. By that act, power and authority to grant licenses was not conferred, but by a public act, entitled "An act concerning county boards established for the protection of public health and the registration of vital facts and statistics in the counties of this State," passed May 5, 1884 (Pamph. L., p. 282), such boards were empowered to regulate and control or prohibit the carrying on of all trades and manufactures in said county, obnoxious or offensive to the inhabitants of such county or any part thereof, and which are attended by noisome or injurious odors (¶ 5, § 4), and to regulate, license and control all dealers in bones, fat and animal offal or refuse whatsoever; also all bone and fat-boiling or grease-making establishments. ¶ 6, § 4. The plaintiffs in error produced on the trial a license from the county board of health to manufacture fertilizers and materials within Hudson county, on Hackensack river, Kearny township, for one year from the 1st day of July, 1884, subject to revocation for cause. This paper lays the foundation of the matters objected to at the trial.

The defendants invoke in their behalf a recognized principle that a public nuisance must be occasioned by acts done in violation of law, and that any business or pursuit which is authorized by law cannot be such nuisance. It is not denied that the legislature have the power to make lawful, so far as the public is concerned, a work or business which by the common law would otherwise be a public nuisance. An instance of the exercise of this power is found in the schedule of powers usually conferred upon railroad companies, many of which, in their unauthorized exercise, would amount to such public wrong. And it has not been questioned in this case that it is competent for the legislature, through its selected agents, to determine when, where and in what manner such business may be conducted.

Such legislation however being in derogation of the common law, must receive strict construction, and the public injury from which one holding such a grant would be protected must be the

necessary results of the authorized business after the exercise of proper care, skill and diligence — employing careful servants and using processes least likely to produce detriment to the public. If he fails in any of these, and unnecessary injury results to the public, he becomes liable to indictment. 2 Whart. Cr. Law, § 1424.

In the light of these rules, and assuming that the licenses which the plaintiffs in error held were lawful authority for carrying on the business so licensed, is the proposition contained in their requests to charge one that is supportable in law? What he asks the court to declare to the jury as a legal rule for their guidance is that the license of this board to carry on a particular business is, under any and all circumstances, a protection against an indictment for nuisance growing out of such business. It left no room for the consideration of unnecessary or even reckless injury to the public in the mode of manufacture. This is the plain meaning of this request, and had it been put to the jury as asked, no matter how willful or extensive the offense to the public may have been, it demanded, in virtue of the licenses, the acquittal of the plaintiffs in error. The proposition can find no support or countenance in any legal rule. But on looking into the licenses, is there any authority given the plaintiffs in error to create noisome odors and smells, and corrupt the air with them to the inconvenience of the public? The authority is, by the licenses, to manufacture fertilizers and materials in a certain locality for one year.

Is it to be assumed that the necessary consequence of such manufacture was to corrupt the air and produce public annoyances? Are we to infer from this grant that either the legislature, or the board acting in their behalf, designed to grant the right under such terms to create what otherwise in law would be a public offense? Such is not its expression, and on every recognized principle in the interpretation of such grants the presumption would be against any such intent. The object of the legislation constituting boards of health and marking out their duties was to prevent nuisances in conservation of the public health. With this purpose as the single object of their creation and sole guide in action, it would be novel indeed to find in such words a license to effect a public nuisance. In either of these views the judge was clearly right in refusing to charge as requested. I am also of opinion that the objection to the charge as made is not supportable. It is to be observed that the charge given which was objected to was in answer to the plaintiff's request.

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The judge had, in a former part of the charge, clearly defined a public nuisance. He had instructed the jury that the business of manufacturing fertilizers was a lawful business when the manner of its conduct was not hurtful or offensive. He had declared the law in this case to the jury in these words: "When a lawful business is conducted in an unlawful manner, so that it is injurious and interferes with the rights of those about him, then that offensive method of conducting the business may be abated, and the parties guilty of it may be punished by indictment if it has become a public nuisance." The plain reduction from what was said in answer to the request is that no inference was to be drawn from the license which the plaintiffs held, that they were authorized to inflict injury upon the public by their mode of conducting the business and that they were responsible if thereby they created a nuisance to the public. If the language used can be understood as an instruction that these licenses can in no wise impair the common-law right of the public to be protected against unwholesome and noxious odors, I would still regard it as a correct exposition of the law.

The purpose which the legislature had in view in creating boards of health was to supply additional means to prevent disease and discomfort; such as might arise from contamination of air, water or food. These means were designed to be auxiliary to existing public methods of protection. It was no part of that purpose to legalize or protect any of the sources of such evil.

It is a mistake to ascribe to this legislation a design to grant immunity from the ordinary legal consequences of creating or continuing a public nuisance. Such design is not to be found in the causes which gave rise to these enactments, and no words found in the acts express or suggest a power in the several boards of health to license offenses against the public health and comfort. Their powers, large as they are, are granted solely for the repression, not the creation or protection of nuisances. The power to license is given as a means of exercising restraint and control over doubtful pursuits, as to those noxious in nature or becoming so by carelessness. The sole power given, or designed to be given, is to abate and suppress.

Business not unlawful in itself may be brought under control by safe and proper regulations touching modes of conducting such business, to avoid offense to the public. But such boards have not been endowed with power to grant away the public right to pure and uncontaminated air.

If it be as the plaintiff in error contends, under a class of laws declared to be enacted for the protection of the public health, power has been conferred upon these local agencies, broad enough to permit, through the form of a license, the establishment in the midst of our largest cities, of the most dangerous and intolerable nuisances. This cannot be conceded.

The evidence offered at the trial has been brought here with the return to the writ. We cannot look into this, but must assume that the convictions rest upon competent and sufficient evidence.

We think there was no error in the refusal to charge as requested or the charge as given, and the judgment should be affirmed.

Judgment affirmed.

IN RE CHEESEMAN.

(49 N. J. Law, 187.)

Contempt—libel of grand jury.

The defendant had been tried on an indictment and the jury had disagreed. He thereupon published in his newspaper an article intending to cast discredit on the grand jury which indicted him, the sheriff who summoned it, and the judge who presided, and would preside on a second trial. *Held*, a contempt.*

PROCEEDINGS for contempt. The head-note states the case.

Wm. E. Potter, for defendant.

DIXON, J. The appellant had been indicted at the January term, 1884, of the Cumberland county Oyer and Terminer, and at the January term, 1885, had been tried on the indictment, but the jury disagreed. On January 30, 1885, he published in his newspaper an article intended to cast discredit upon the members of the grand jury that had indicted him, upon the sheriff who had summoned the jury, and upon the judge who had presided at his trial, and who in the regular course of official duty, would preside when he should be again tried. For this article the appellant was adjudged by said court to be guilty of contempt and to be fined \$100, whereupon he appealed to this court.

* See *State v. Frew* (24 W. Va. 416), 49 Am. Rep. 237.

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The appellant's counsel insists that such a publication is not a contempt of court in this State. Fully admitting that it would be regarded as a contempt in England according to the views of the present day, he contends that such views had their origin subsequent to the American revolution, and are therefore not to be considered as indicating our common law. That this position is however false will appear from a reference to many declarations and decisions made before our separation from the mother country, by writers and courts to whom we are wont to look for authoritative evidence of the common law.

As early as the time of Lord CLARENDON, the first chancellor after the restoration, prosecutions for contempt by abusive words uttered out of court had become so frequent, that a special rule of court was adopted for their regulation. Com. Dig., tit. "Chancery," D. 1, note h.

In 1709, a defendant, on being served with a rule of the Queen's Bench to show cause why an information should not be filed against him, spoke of the rule in a contemptuous manner. The court sent an attachment for contempt against him, without even a rule that he show cause why it should not be issued. *Anon.*, 1 Salk. 84.

In 1720, the same practice was pursued in the King's Bench against one Jones, who had treated the process of the court contemptuously (*Rex v. Jones*, Str. 185); again in 1724, against one who had used contemptuous words on the delivery to him of a declaration in ejectment (*Rex v. Unitt*, Str. 567), and again in 1737, under circumstances like those of *Rex v. Jones*, *supra*; *North v. Wiggins*, Str. 1068.

In 1720, Pool was committed for contempt of the Court of Chancery, in having put an advertisement in the "*Daily Courant*," offering a reward of £100 for legal proof of a certain marriage then in question before the court, Lord Chancellor PARKER saying: "This tends to the suborning of witnesses. * * * and is a contempt of court, being a means of preventing justice in a cause now depending. * * * and as the court may, so in justice it ought to punish this proceeding." *Pool v. Sacheverel*, 1 P. Wms. 675. It was this jurist whom Hawkins, in the preface to his second book on the Pleas of the Crown, described as possessing the most perfect skill and experience in the common law.

About 1724, Dr. Colbatch was attached for contempt in the King's Bench, for having written in his *Jus Academicum*, in allu-

sion to the court's granting writs of *mandamus* and prohibition against the University of Cambridge, "that they who intend to subvert the laws and liberties of any nation commonly begin with the privileges and immunities of the universities." Chief Justice PRATT sentenced him to be imprisoned, fined, and bound over to good behavior. 3 Campb. Lives of Ch. Just. 70.

Shortly afterward, Dr. Colbatch's adversary, Dr. Bentley, complained to the King's Bench that Cambridge had taken away his degree without hearing him, because, on being served with process to appear in an action of debt before the vice chancellor of the university, he had said contemptuously to the beadle, that the process was illegal and he would not obey it, that the vice chancellor was not his judge, and was acting foolishly. The same chief justice, in reversing the action of the university, remarked: "If Dr. Bentley had said as much of our process, we would have laid him by the heels for it; he is not to arraign the justice of the proceedings out of court, before an officer who has no power to examine it." *Rez v. University of Cambridge*, Str. 557, 565.

In 1744, the King's Bench granted a rule for an attachment against one Redman, for threatening Murphy (the prosecutor in an information for a misdemeanor) with danger of his life, and saying he would be hanged. *Rez v. Carroll*, 1 Wils. 75.

About the same time, Lord HARDWICKE committed two printers to prison for contempt of court in printing reflections on the parties and witnesses in a cause pending in Chancery, saying "there is nothing of more pernicious consequence, than to prejudice the minds of the public against persons concerned as parties in causes, before the cause is finally heard. * * * One kind of contempt is scandalizing the court itself. There may be likewise a contempt of this court in abusing parties who are concerned in causes here. There may be also a contempt of this court in prejudicing mankind against persons before the cause is heard." *Roach v. Garvin*, 2 Atk. 469.

About 1720, Hawkins' Pleas of the Crown was issued. In it the learned serjeant enumerates among the most remarkable instances of contempts for which any person is punishable, "contemptuous words or writings concerning the court," of which kind, he says, it seems endless to put any instances, since they are generally so obvious to common understanding. 2 Hawk. P. C., chap. 22, §§ 33, 36.

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Before 1740, Comyn's Digest was published, and it is therein asserted that attachment will lie for abusive usage or words of the process, or officers of the court. Com. Dig., tit. "Chancery," D. 3.

Between 1740 and 1750, Viner's Abridgment appeared, which under the title "Contempt" states: "Sometimes a contempt arises in using words imputing scorn, reproach or diminution of the court."

And finally, Blackstone, in his fourth book (page 283), published within a decade before the American Revolution, mentions among the principal instances of contempts of court punishable summarily by attachment, those committed away from the presence of the court, by parties writing or speaking contemptuously of the court or judges acting in their judicial capacity.

In this array of authorities, running through the two generations next preceding the "Declaration of Independence," is not to be forgotten Chief Justice WILMOT's opinion in *Almon's* case, written 1765, vindicating the power to punish this species of contempt as one inherent in the superior courts according to the settled principles of the common law. Wilmot's opinion, 243.

These citations may be fitly closed by the testimony of Lord ERSKINE, uttered indeed thirty years after New Jersey had ceased to be a colony of Great Britain, but toward the end of a life made illustrious by such devotion to the "liberty of the press" as not even its extreme advocates will question; he said, in *Ex parte Jones*, 13 Ves. 237 (1806): "It never has been, or can be denied, that a publication, not only with an obvious tendency, but with the design to obstruct the ordinary course of justice, is a very high contempt."

It thus appears, beyond dispute, I think, that the superior courts of England, before the formation of the United States, had legal power to punish summarily for any words uttered by speech, by writing or by printing, outside of the regular course of litigation, which were designed to bring contempt upon the courts in the exercise of their judicial functions, or to pervert in a pending cause the due administration of justice.

The appellant's counsel contends, in the next place, that this power did not pass to the courts of New Jersey.

So far as our courts are modeled after English courts of common law, a presumption arises that they possess all the powers which their prototypes lawfully exercised, and the burden of establishing

the contrary rests upon him who asserts it. Counsel endeavors to maintain his position upon the ground that the power now denied is contrary to the spirit of our institutions, and so far as our reports show has never been exercised in this State.

The reason for deeming it contrary to the spirit of our institutions that our courts should have the same power as their predecessors to defend themselves against abusive words, is not apparent. Only two arguments for withdrawing from them this authority can be imagined, one that abusive words have ceased to be regarded as a means of injury; the other, that such power could no longer be safely intrusted to the courts. But neither argument is well founded; for by adopting the common law touching slander and libel, our forefathers unequivocally asserted their opinion that injury would still flow from unbridled tongues and pens, and by conceding to the courts the power of punishing contempts generally, they recognized the trustworthiness of the judiciary in vindicating, by summary process, their own authority and dignity. Why then should this single species of injury be taken from the category in which it has always stood? The importance of the "liberty of the press" is urged upon us. We do not underestimate it; but after all, the liberty of the press is only the liberty which every man has to utter his sentiments, and can be enjoyed only in subjection to that precept both of law and morals: *sic utere tuo, ut alienum non lædas*. In a government where order is secured, not so much by force as by the respect which citizens entertain for the law and those charged with its administration, nothing which tends to preserve that respect from forfeiture on the one hand and detraction on the other, can be hostile to the Commonwealth.

It is true, as stated, that there is not, in our reports, any instance of the exercise of the power to punish for mere words as a contempt; but this by no means indicates that the power has not been employed. The occasions on which it might properly be used are most likely to have arisen in those courts that try and decide causes in the immediate presence of interested parties, and therefore under circumstances more calculated to excite evil dispositions; and the proceedings of these courts are not reported, nor until the statute of 1884, under which the present appeal is taken, were they subject to review in courts whose decisions are reported. The authority of our superior tribunals over this class of contempts has never been questioned; and whenever it has been referred to in our reported

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cases, it has been either declared or assumed to remain with us in its original vigor. In *Flommerfell v. Zellers*, 2 Halst. 31 (1823), counsel spoke of it as an undoubted power; in *State v. Doty*, 3 Vroom, 404 (1868), Chief Justice BEASLEY mentions it as one repeatedly enforced; and in *Reinhart v. Lance*, 14 Vroom, 311 (1881), where Mr. Justice DEPUE discussed at large the subject "contempts," there is no intimation that this branch of judicial authority has been lopped off. In our judgment the power exists, notwithstanding the apparent infrequency of its exercise.

Counsel further contends that the proceedings of the court below should be annulled because there does not seem to have been any affidavit of the facts as a foundation for the rule to show cause. This is not now a sufficient reason for reversal. No doubt the ordinary course of practice in such cases in courts of law is that an affidavit of the facts should first be presented; then that a rule should be entered requiring the alleged offender to show cause why he should not be attached for contempt; then if good cause be not shown, that an attachment should issue, and the accused, on being brought in, should be either held to bail or committed to answer interrogatories; then that interrogatories should be exhibited and answered; and thereupon according as his answers confess or deny his guilt, he should be punished or discharged. But the practice has not been uniform. Sometimes a rule to show cause has been allowed without an affidavit, on a mere suggestion; sometimes an attachment has issued without a rule to show cause; sometimes punishment has been inflicted forthwith on the offender's confession when brought in by the writ, without interrogatories; and sometimes, as in *McQuade v. Emmons*, 9 Vroom, 397, the penalty has been imposed on the offender's admissions made under the original rule, without either writ or interrogatories. So that these various steps are manifestly not jurisdictional, except to the extent of laying before the court matters which constitute a contempt, and affording to the party accused a fair opportunity of denying or confessing their truth. In the present case, the appellant, on the return of the rule to show cause, filed his affidavit declaring the truth of all the matters alleged in the rule as the basis for its allowance, and although the consideration of the cause was then adjourned from term to term, yet the appellant never intimated that an affidavit should have been presented before the rule was granted, or that he was entitled to have an attachment issue or interrogatories

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filed, or that the rule should be discharged for want thereof; and even after sentence was pronounced, he obtained leave to amend his affidavit, but did not complain of any irregularity or illegality in the proceedings. Under these circumstances the objection now made cannot be sustained.

Lastly, we are pressed with the impolicy of exercising the power to punish abusive publications as contempts.

We decline to weigh the *pro* and *con* of this argument, in performing our duty as an appellate tribunal. Although by the statute (Pamph. L. 1884, p. 219) we are to rehear the case of the appellant both upon the law and the facts, and to give such judgment as shall seem to be lawful and just, yet we are to do this in review of a judgment already rendered in the court below for the protection of its own dignity, peace and good order; and if in such judgment there is found, according to the law and the facts, nothing unlawful or unjust, it should be affirmed, whether in our individual opinions it was politic or impolitic to set the machinery of prosecution in motion.

We consider the judgment of the Oyer both legal and just, and therefore it is affirmed. *Judgment affirmed.*

 EVANS v. McDERMOTT.

(40 N. J. Law, 162.)

Animals — Liability for injury by — viciousness.

One may recover for an injury by the bite of a dog upon showing the owner's knowledge of his propensity to bite, whether in anger or not. (*See note, p. 605.*)

ACTION for injury by the bite of a dog. The opinion states the case. The plaintiff had judgment below.

M. W. Niven, for prosecutor.

W. D. Daly and *James Flemming*, contra.

PARKER, J. An action was brought in the Hoboken District Court, by John McDermott against Samuel Evans, the prosecutor, to recover damages occasioned by the bite of a dog.

It was proved that McDermott, at the time he was bitten, was in the saloon kept by the prosecutor as a place of public resort; that

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the prosecutor was the owner and possessor of the dog; that in going from the billiard-room to the bar-room of the saloon, McDermott met the dog in the passage-way; that he put out his hand to motion the dog out of the passage-way he was obstructing, when the dog growled and bit him on the hand.

McDermott swore that about a month after he was bitten, his hand broke out from the effect of the bite; that he became nervous, lost sleep and suffered pain; that he employed a physician, paid for medicines, lost two or three weeks' wages, and was out of pocket in money about \$25.

Dr. Pinder, a practicing physician, swore that about the time McDermott's hand broke out, he was consulted professionally; that he made an examination of the hand and prescribed for the injury. He said that he found the skin broken, the hand considerably inflamed and swollen, and that it appeared to him to be a pretty bad hand. The witness added that hydrophobia might possibly result from such a wound, but that he did not apprehend such result in this case.

At the close of the plaintiff's evidence, the counsel for the defendant moved to nonsuit, on the ground that it did not appear that the dog had bitten McDermott maliciously; and also on the ground that there was no proof that the dog had bitten other persons, except in play; or that the defendant had knowledge of the propensity of the dog to bite.

The judge refused to nonsuit. In charging the jury, the judge said: "Some time ago, a girl was bitten by a dog in this State; the case was carried to the Supreme Court, and a judge there held the owner of the dog liable for an injury committed by the dog, if he had notice of his mischievous propensity; and this is the law which applies to this case." Upon request to charge, the judge held, in substance, as he had ruled on the motion to nonsuit. The jury found for McDermott in the sum of \$300 damages.

When the plaintiff rested, there was evidence of the propensity of the dog to bite, and that the defendant knew of it, before McDermott was bitten. But it is said, on the part of the prosecutor, that although several persons had been bitten by the dog, of which he had information, yet it appeared that in every instance the biting occurred while the dog was in a playful mood; and it is argued that damages cannot be recovered where it is shown that the dog had a propensity to bite only in play; but that to justify a recovery,

it must appear that the dog was in the habit of biting mankind while in an angry mood, actuated by a ferocious spirit.

This is not the law. An action can be maintained against the owner by a party injured, upon evidence that a dog, with the knowledge of the owner, had a mischievous propensity to bite mankind, whether in anger or not. In either case the person bitten would suffer injury. A mischievous propensity is a propensity from which injury is the natural result.

In the case of *Hudson v. Roberts*, reported in 6 Exch. 699, it appears that the plaintiff was walking in the street, wearing a red handkerchief. The bull of the defendant, ordinarily gentle and quiet, and not known to have gored any person previously, was being driven along the street, when he attacked and gored the plaintiff. The defendant said that the red handkerchief caused it, and that he knew the bull would run at any thing red. The plaintiff recovered. The bull had no hostile feeling against the man he injured, and no disposition to gore mankind, yet because of his mischievous propensity to rush at a red object, of which his owner knew, it was held that when he caused injury to the plaintiff, through that propensity, his owner should pay damages.

A domesticated bear may hug a man until his ribs be broken. This may be the mode adopted by the animal to manifest his affection; yet if he had on other occasions previously shown his affection in that way, causing injury, and his owner knew of such propensity, the owner would have to pay damages caused by breaking the man's ribs. It is true that the bear is classed with animals *fera natura*, and the presumption in such case would be that although domesticated the animal had relapsed into his wild habits, yet although the presumption on the question of *scienter* would be against the owner, he might be able to prove that the habit of embracing persons did not proceed from the savage nature of the bear, but under the influence of civilization from a cultivated affection.

But this proof would not avail the owner in a suit by a party embraced. Such a propensity would be held to be mischievous, because hurtful to those who were the objects of the bear's affection.

In the case of *Oaks v. Spaulding*, reported in 40 Vt. 347, it appeared that Mrs. Oaks was driving cows home from pasture, when the ram of Spaulding attacked and injured her. It was shown that the ram had a propensity to butt mankind and that the

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defendant knew it, but it did not appear whether the previous buttings by the ram proceeded from an ugly disposition, or from the exuberance of a playful spirit; yet it was held that the defendant was liable. It did not cure the hurt nor assuage the pain of the woman to be told that the ram, when he butted her, was only in one of his accustomed sportive moods. It might have been fun for the ram, but it was hurtful to Mrs. Oaks. It was a mischievous propensity, whether proceeding from ugliness of temper or from good nature, which if known to the owner of the ram made him liable for damages resulting from such propensity.

There is no doubt that in cases of animals, not naturally inclined to do mischief, a previous mischievous propensity must be shown, and the *scienter* clearly established. The gist of the action is not the keeping of the animal, but the keeping with knowledge of the mischievous propensity, whether proceeding from a savage disposition or not.

The conclusion is that the plaintiff below, having shown by his proof that on several previous occasions the dog in question had bitten various persons on the hand, with the knowledge of the defendant, he was entitled to recover, even if the habit did not proceed from a ferocious nature, but was the result of a mischievous propensity.

In this instance (whatever may have been the circumstances attending the previous bitings of the dog), the bite was accompanied by a growl, while McDermott was in a place where he had a right to be, and when he was doing nothing except to motion the animal out of the passage-way, which he was obstructing.

The damages found by the jury are not excessive. In such a case they cannot be measured by mere expenditure of money to cure from the effects of the bite. Compensation should be made for the pain and the anxiety of mind which must necessarily follow the bite of a dog.

The judgment of the District Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER.— See *Mann v. Weiland*, 81* Penn. St. 248; s. c., 38 Am. Rep. 753, note. In an action for injury to the plaintiff by defendant's horse striking him with his fore feet, evidence that the animal had the vicious propensity to injure mankind by kicking with his hind feet, of which propensity the defendant had knowledge, may be received. It is not necessary, in order to fasten a liability upon the owner, that he have notice of a previous

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injury to others. *Bider v. White*, 65 N. Y. 54; *Godeau v. Blood*, 53 Vt. 253; s. c., 36 Am. Rep. 751; *Worth v. Gilling*, L. R., 2 C. P. 1; *Judge v. Cox*, 1 Stark. 385; *Cooley Torta*, 344. It is the propensity to commit the mischief that constitutes the danger (*McCaskill v. Elliott*, 5 Strobb. 196), and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. *Eightlinger v. Egan*, 65 Ill. 235; *Buckley v. Leonard*, 4 Denio, 500; *Applebee v. Percy*, L. R., 9 C. P. 647; Abb. Trial Ev. 645; *Shearm. & Redf. Neg.* (8d ed.), § 190. The question in each case is, whether the notice was sufficient to put the owner on his guard, and to require him, as an ordinarily prudent man, to anticipate the injury which has actually occurred. *Cooley Torta*, 344. Hence it is unnecessary to prove more than that he has good cause for supposing that the animal may so conduct. *Kettridge v. Elliott*, 16 N. H. 82. And a good cause for so supposing in the present case was the defendant's knowledge that the animal was of vicious disposition and a "notorious kicker;" and the jury might well conclude from these undisputed facts alone that the defendant had sufficient knowledge of its vicious nature and propensity to make him liable for its subsequent attack on the plaintiff in consequence of that nature and propensity. For when it is made to appear that any domestic animal is vicious and inclined to do hurt, and the owner has notice, express or implied, of the fact, the law then imposes upon him the duty to keep the animal secure, and makes him liable to any person, who without contributory negligence on his part is injured by it. And this rule is so entirely reasonable, and is so strictly in accordance with the legal and moral duty, obligatory upon everybody, so to keep and use his own property as not to wrong and injure others, that authorities need not be cited in its support. N. H. Sup. Ct., July 8, 1886, *Reynolds v. Hussey*.

See *Smith v. Donahue*, post, 652.

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(49 N. J. L. 356.)

Statute—"send and convey" a letter.

Under a statute making it criminal to send or convey an insulting, indecent, lascivious, disgusting, offensive or annoying letter or communication to any female, an indictment charged that such a communication was sent by the defendant to Henrietta Conover. She was a married woman, residing with her husband. The communication was inclosed in a sealed envelope, directed to her husband at his post-office address and sent by mail. In the same envelope was a letter to the husband requesting him to hand the inclosed to his wife. Mrs. C.'s son got the letter from the post-office and took it home and handed it to her. (She opened it and read it. *Held*, a sending to her by the accused.)

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CONVICTION of willfully and wantonly sending and conveying to one Henrietta Conover, a female, an insulting, indecent, disgusting, offensive and annoying letter and communication, against her will and consent. The head-note states the facts.

R. S. Kuhl and *A. A. Clark*, for plaintiff in error.

E. P. Conklin, prosecutor of the pleas, and *J. N. Voorhees*, contra.

DEPUE, J. The communication for sending which the accused was indicted is set out in the indictment. It is insulting, indecent, disgusting, offensive and annoying, and was sent without lawful purpose in sending the same.

[Omitting minor points.]

Exception was taken to the refusal of the court to charge that there was no evidence that the defendant did send or convey to Henrietta Conover the alleged writing or communication.

To make the sending of such a communication indictable it must, by the statute, be sent to a female. The indictment charges that it was sent to Mrs. Conover. Proof that it was sent to her in a legal sense is necessary to sustain the conviction.

The evidence tended to show that the communication was in the defendant's handwriting. It is prefaced by these words: "Solilloquy of Dame Conover, Princes Consort of the Conover Hell, in Conover Dale, near Copper Hill, Hunterdon Co., N. J." The communication contains indubitable evidence that the writer intended that it should be seen and read by Mrs. Conover. Every line of the writing evinces a fixed purpose to traduce, defame and insult her. The purpose of the writer could be fulfilled only by his offensive epithets being brought to the knowledge of the object of his malignity.

Mrs. Conover resided with her husband at Copper hill, near Ringoes. The communication was inclosed in a sealed envelope, directed to the husband, David Conover, Copper Hill, P. O. The envelope had on it the post-office stamp "Lambertville, January 30, 1885." Jonathan Conover, a son living at home, got the letter from the post-office at Copper Hill. David Conover, the husband, was sick at home at that time. The son brought the letter home and handed it to his mother. She opened it and read it to the

members of the household. Inclosed in the same envelope was another communication addressed "To his Conovership the Prince of the Conover Hell, near Copper Hill, Hunterdon Co., N. J., greeting," and intended for the husband. It had affixed to it a postscript: "P. S. Please hand the enclosed paper to your Consort Dame Conover, the Honored Princess of your establishment."

The writing on which the indictment was founded was intended for Mrs. Conover. It was sent to her husband with a request that it should be handed to her. It was received and read by her. Was the communication "sent to" her within the meaning of the statute?

In *Rex v. Wagstaff*, Russ. & R. 398, the indictment was on the statute 27 Geo. II, chap. 15, for sending a threatening letter to Richard Dennis. The letter was directed to Richard Dennis, and was dropped by the prisoner in the yard of the residence of Dennis. It was picked up by the wife of the prosecutor, who first read the letter herself and then read it to her husband. The judge instructed the jury that if the prisoner carried the letter and dropped it, "meaning that it should be conveyed to Dennis, and that he should be made acquainted with its contents," the letter was sent within the meaning of the statute. The conviction was sustained. The judges thought a letter dropped near the prosecutor, with intent that it might reach him, was a sending to him. In *Lloyd's case*, which was an indictment for sending a letter to one Salway, demanding money, the prisoner dropped the letter in the vestry-room, which Salway frequented every Sunday, from whence the sexton had picked it up and delivered it to him. Mr. Justice YATES, before whom the case was tried, reported to the court that "it seemed to him to be very immaterial whether the letter was sent directly to the prosecutor or put into a more oblique course of conveyance by which it might finally come to his hands." The court *in banc* expressed no opinion on this point, the judgment being arrested on another ground. 2 East P. O. 1123.

In *Rex v. Paddle*, Russ. & R. 484, the indictment charged the prisoner with sending a letter to William Kirby, threatening to burn the house of one Rodwell, and the stacks of hay, corn and grain of one Brook. Kirby received the letter by post, and it was communicated very soon after to Rodwell and Brook. It was objected that it was indispensably necessary that the indictment should charge the sending of a threatening letter to the party

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threatened, whereas it was stated in the indictment, and appeared upon the evidence, that the letter was sent to a stranger, who might have destroyed the letter without the party threatened knowing any thing about it. The court *in banc* considered that the sending the letter to Kirby, as he was not threatened, was not within the statute, and on that account judgment was arrested, manifestly on the ground of a defect in the indictment; but the court intimated that if Kirby had delivered it to Rodwell or Brook, and the jury should think that the prisoner intended he should so deliver it, that would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect.

In *Regina v. Grimwade*, 1 Den. C. C. 30, reported also in 1 Car. & K. 592, the case was considered upon the second count of the indictment, which charged the prisoner with sending to one Brown a letter directed to Sir Joshua Rowley, threatening to burn the barn of Brown. At the trial it was proved that the letter was left by the prisoner at a gate in the public road near Sir J. Rowley's house, directed to him as described in the indictment, and sealed. Having been found there by one of the witnesses, it was forwarded by him to Sir J. Rowley's house and there deposited in the steward's room. There it was opened by the steward, who was authorized by Sir J. Rowley to open and read such letters. The steward, having opened and read it, did not deliver it to Sir Joshua Rowley, but handed it over to a constable, who afterward showed the letter to Brown and to Sir J. Rowley. The learned baron directed the jury to consider whether the prisoner, in leaving the letter as before described, intended that it should not only reach Sir Joshua Rowley, to whom it was directed, but that it also reach Brown; and then if they thought so, the learned baron was of opinion that would be a sending to Brown, and then the prisoner might be found guilty upon the second count. The court affirmed the conviction; on the ground that it was properly left to the jury to say whether the dropping was a sending. In all the cases I have found the principle is either affirmed or recognized, that under statutes similar to that under which this indictment was found, a letter is sent, within the meaning of the statute, when it is put in the course of transmission by the accused, with the intent that it should reach the person to whom it is charged in the indictment to have been sent, provided that in fact it reaches such person. *Jepson and Spingott's case*, 2 East P. C. 1115; *Heming's case*, 2 Vol. LX — 77

East P. C. 1116; *Girdwood's case*, 2 East P. C. 1120; s. o., 1 Leach, 169; *Queen v. Williams*, 1 Cox C. C. 16; *Queen v. Carruthers*, 1 Cox C. C. 138; *Regina v. Jones*, 2 Car. & K. 398; 2 Whart. Cr. L., § 1666 a. Nor is the effect of the decisions referred to impaired by the fact that they were made upon statutes which did not specifically require the letter to be sent to any particular person, for by legal construction such statutes are held to require that the letter should be sent to the person threatened, and the indictment thereunder must so allege. *Rex v. Paddle*, Russ. & R. 484.

That the communication was inclosed in an envelope directed to the husband cannot alter the case. The writer intended that it should come to the wife's knowledge, and requested that it should be handed to her. When these communications were received, that the husband should have shown them to the wife with a view to discover the writer was, from the character of the communications, natural and to be expected. Where the criminal *animus* is exhibited, and the offender has taken such steps to carry it into effect as would probably produce the result contemplated, the court should not resort to over-nice or strained constructions to shield the party from the consequences of a criminal act which in fact had been accomplished by the very means he selected. The judge properly refused to charge as requested. He also properly denied the request to charge that the defendant, if guilty of any offense, was only an accessory. In misdemeanors there are no accessories. All persons criminated are guilty as principals. The judge's instruction, that "if the defendant intended this communication for Mrs. Conover, having taken the means for her to get it, it is a sending to her by him, and makes him the principal, no matter what means he employed for it to reach her, or from what source she received it," was substantially correct.

[But on another point]

Judgment reversed.

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STATE V. GODWINSVILLE AND PATERSON MACADAMIZED ROAD COMPANY.

(40 N. J. L. 202.)

Criminal law — nuisance — neglecting to keep highway in repair.

A turnpike company may be indicted for failure to maintain its road in repair prescribed by the charter, but not for failure to construct the road in the prescribed manner.

INDICTMENT for nuisance. The opinion states the case.

J. W. Griggs, for State.

W. B. Gourley, contra.

VAN SYCKEL, J. [Omitting details of indictment.] The obligations imposed upon this defendant company by its charter are recited in the indictment, and the allegation that the road has not been constructed in the required manner, and that by reason thereof the road is in a soft, miry and rough condition, is relied upon to establish the charge of nuisance. A common nuisance, says Hawkins, seems to be an offense against the public, either by doing a thing which tends to the annoyance of all the king's subjects, or by neglecting to do a thing which the common good requires. 1 Hawk. 360; 4 Bl. Com. 166; Angell Highways, § 222.

Any defect that impairs the safety of the highway for the purposes of travel, or essentially interferes with its convenient use, is an indictable and actionable nuisance at common law. Wood Nuisance, p. 267, § 324.

In Angell on Highways, § 259, it is said "that convenience and safety are the essential conditions of a well-maintained highway, both at common law and by statute. Whether a given highway fulfills the conditions is a mixed question of law and fact, to be settled under proper instructions from the court. In determining this question it is necessary to consider the location of the road, and the kind and amount of travel over it. A road safe and convenient in the country might be unfit for the city."

In *Waterford Turnpike Co. v. People*, 9 Barb. 161, the indictment charged the defendant with nuisance in neglecting to make

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and maintain the road in a proper manner. The trial court refused to charge the jury that the defendant could not be convicted if the road was safe and passable. In reviewing the case the Supreme Court said "that the charter of the turnpike company was in the nature of a contract between the stockholders and the public. The former agree in consideration of the tolls granted to them, to construct the road in a prescribed manner, and to keep it substantially in that condition during the existence of the charter. A violation of that duty is punishable by indictment at common law. To constitute a nuisance it is not essential that the road should be unsafe or impassable. Any contracting or narrowing of a highway is a nuisance. Any obstruction left in it or omission to repair it, whereby it is less convenient for public use, falls within the same category."

Howard v. North Bridgewater, 16 Pick. 189 was an action on the case for damages for injuries to a horse from stones in the highway. The court said that an action would not lie unless the town was indictable, and held that in determining that question it was necessary to consider what duty was required of the town in reference to reparation.

In *Proprietors of Quincy Canal v. Newcomb*, 7 Metc. 276, Chief Justice SHAW maintained the same view, saying that if the canal was not made according to the provisions of the act of incorporation it was a failure to perform a public duty, for which indictment would lie.

Our court of last resort has recognized this to be the correct rule. *Stults v. East Brunswick & New Brunswick Turnpike Co.*, 48 N. J. L. 596 was a suit brought to recover tolls alleged to be due from Mrs. Stults to the turnpike company for travel by her over the road. She set up in her defense that the company had not complied with the requirements of their charter in that they had not constructed the road in the manner therein prescribed and had not kept it in repair. Chancellor RUNYON, in delivering the opinion of the court, that this defense was inadmissible, said "that the company was answerable for such delinquencies to the public at large in a public prosecution, and not to the defendant or any other individual," and in support of that doctrine he cited the case in 7 Metc. 276.

The legislature granted the right to take tolls upon the theory that it was necessary for the public that the road should be solid

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and firm. The condition in which the public convenience requires that the defendants' pike shall be kept can be settled only by reference to the charter. The failure to make it conform to that standard is noxious and hurtful to the public. The public is thereby deprived of that which has been pronounced to be essential to the public good. The duty of maintaining and repairing highways and the extent and nature of that duty lie at the very foundation of the liability to indictment.

In *The Queen v. Inhabitants of Stretford*, 2 *Ld. Raym.* 1169, the indictment alleged that the highway was very muddy and so narrow that people could not pass without danger to their lives. *HOLT*, C. J., and *POWELL* held the indictment naught for want of saying that the way was out of repair, and *POWELL* said that the saying it was so narrow that the people could not pass was repugnant to its being the king's highway; for if it had been so narrow people could never have passed there time out of mind. It was not alleged nor did it appear that it was the duty of the inhabitants to keep the public way free from mud. In the absence of such an allegation no breach of duty was shown. In the common-law form it is sufficient to set forth the duty and show the neglect.

In *Rex v. Inhabitants of Hendon*, 4 *Barn. & Ad.* 628, the indictment alleged it to be the duty of the said defendants to repair and amend a bridge, and averred that the bridge "was out of repair." The defendants were convicted, and on motion in arrest of judgment the King's Bench refused the rule. When the manner in which a highway shall be maintained is not prescribed by statute the common law requires that it shall be convenient and safe. It becomes a public nuisance when and for the reason that by neglect it ceases to be maintained in the required condition. When therefore the legislature declares a turnpike to be necessary by the grant of a franchise to a company to construct it, with the right to exact tolls under the duty of maintaining it in a specified manner, whether it is a nuisance or not must depend upon its conformity to the statutory standard. It seems unreasonable to hold that this company shall not be amenable to indictment for nuisance, unless the road is suffered to fall into such decay as would constitute a nuisance in case of an ordinary highway. It must not be understood that the mere neglect on the part of the company to make the turnpike conform in its construction to the exactions of its charter subjects it to indictment. Such is not the rule intended to be announced. It

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is only when by reason of such want of conformity, the road has ceased to be solid, firm and even, as the charter commands, that the criminal prosecution can be resorted to. So long as the highway is kept in that state the company cannot be called upon to respond in a criminal court upon an allegation that in some respect there has been a departure from or a want of conformity to the mode of construction required by the charter. The duty to maintain the highway in a certain condition, and the neglect to perform that duty, constitute the criminal offense. The crime is committed when the dereliction of that duty exists. The charter of the defendant company does not provide any mode for redressing the injury to the individual or to the public, and if the defendant can continue to exact tolls without being liable to indictment for neglect of the obligation imposed by the statute, the public will be without adequate means of redress. Even if a penalty was provided in the charter, it would be no bar to indictment. 2 Archb. 989; *Simpson v. State*, 10 Yerg. 525; *Waterford Turnpike Co. v. People*, 9 Barb. 174.

The charge in the indictment "that the defendants, during all the time aforesaid, have kept and maintained the road in a soft, miry and rough condition," is a sufficient averment to show that it is a public nuisance. Admitting this to be the correct doctrine, the defendant cannot be called upon to answer to the State in this case. The indictment alleges that it was the duty of the company to complete the macadamizing of the turnpike in the manner aforesaid, within six years from the 2d day of April, 1868, and that it was not done within the said time or at the time of finding the indictment. To this specification the defendant can make two sufficient answers:

First. The indictment was found in 1883, and consequently more than two years had then elapsed after the offense charged had been committed. It does not appear, from any thing averred in the indictment, that the duty to complete continued after the expiration of six years, or that the defendant had a right to complete it after six years. On the contrary, it is expressly charged in the indictment that unless it was completed within six years the said charter should be void. The charter being the only authority for doing the work, if the charter became void the right to do the work ceased. Consequently the offense set forth is barred by the statute of limitations.

Secondly. The averment that the company has failed to construct the turnpike in the prescribed manner does not, as has been before

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stated, authorize a resort to criminal procedure, in the absence of the further allegation that it was the duty of the company to maintain the road in a certain state of repair, and that in consequence of neglect of that duty it had fallen out of repair.

The indictment alleges that the defendants have, during all the time aforesaid, kept and maintained the road in a soft, miry and rough condition, but there is an entire absence of averment to show that they were under any duty or obligation to keep the road in repair. Failure to repair is not the offense charged in the indictment.

The Oyer and Terminer should be advised that upon the pleadings certified judgment should be rendered for the defendants.

SNOWHILL V. REED.

(40 N. J. L. 222.)

Landlord and tenant—surrender during term—suit for breach of covenant to leave in repair.

A lease for one year contained a covenant that the tenant would deliver possession of the premises on the expiration of the lease, in as good repair as they were at the commencement thereof. There was a surrender of the lease before the end of the year, and in an action for breach of that covenant, *held*, that the tenant was not relieved from the performance thereof by the surrender before the end of the year.

ACTION for breach of contract to surrender leased premises in good repair. The head-note states the point. The defendant had judgment below.

Alan H. Strong, for plaintiffs in certiorari.

Samuel A. Patterson, for defendants.

REED, J. It is first objected by the counsel for the plaintiffs in *certiorari* that the court below admitted evidence improperly.

This was oral testimony on the part of the defendant to the effect that while the negotiations for the agreement to surrender were in progress one of the plaintiffs said that if the defendant would let the plaintiffs have the property they would not ask him to put back the counters and shelving.

This testimony was improperly admitted.

The writing itself was complete upon its face. It expressed clearly upon what terms the surrender should be made. The parol testimony engrafted a new term upon the written agreement, and for this purpose its reception was illegal. *Naumberg v. Young*, 44 N. J. L. 331; s. c., 43 Am. Rep. 380.

This error will lead to a reversal, unless by the arrangement to surrender the defendant is relieved from a performance of the covenant to leave the premises in as good repair as they were at the commencement of the lease. The term, by the lease, was to run from October 1, 1883, to October 1, 1884. Had there been no accepted surrender the covenant would have been performed by leaving the premises in repair on October first, the end of the term. The tenant was not bound to keep the premises in repair during the continuance of the term, but only to leave them in good repair at the end of the term. Nor is it deniable that a surrender terminates the tenant's estate, and with it all covenants contained in the lease, and operates to relinquish all rights of action for breaches which did not occur during the life of the lease. *Platt Covenants*, 585; *Deane v. Caldwell*, 127 Mass. 242.

The question here presented is whether the covenant was broken during the life of the lease. If it could not be broken until the end of the term named in the lease, namely, at the end of one year, then it follows that it was at that time impossible for the tenant to perform.

By the surrender he was out of possession, and by the acceptance of the surrender the landlord had assented to an extinguishment of the covenant before any breach.

But I do not regard the covenant as one to leave the premises in repair at the end of the period of time mentioned in the lease.

The time for performance was the time of expiration of the lease. The lease expired by reason of the surrender as effectually as it would have expired by the efflux of time without a surrender. When therefore the defendant entered into an arrangement for a surrender, the event upon which the performance of his covenant was dependent was shifted from October first to September first.

This conclusion seems to accord with the result in the case of *Austin v. Moyle*, Noy, 118, cited at length in *Platt Covenants*. A. leased to B. for ten years, and B. covenanted to leave four acres of the ground fallowed and plowed at the end of the term, and in the lease there was a proviso that if B. mistake his bargain he may sur-

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render his estate on a year's warning. B. afterward surrendered accordingly, and it was adjudged by the court that the surrender was no dispensation of the covenant, but otherwise, if the lessee had covenanted to leave the four acres fallowed and plowed at the end of the ten years, for then the acceptance of the surrender before the expiration of the ten years would have made it impossible for the tenant to perform his covenant.

In the above case it is true that the option of a surrender before the ten years is contained in the lease, and so this ending of the term may be said to have been in accordance with the terms of the lease itself. But I am unable to see in what way the insertion of the right to surrender in the lease affects the principle. The construction of the covenant still remains to be determined by the inquiry whether the tenant was to perform at the end of the period named in the lease, or at the expiration of the tenant's term. If the former, then a surrender before the arrival of the end of the period named discharges the covenantor. If the latter, then a surrender, which itself ends the term, fixes the time of the surrender as the time for performance.

I construe the present covenant to bind the tenant, not to leave the premises in repair at the end of one year, but whenever the lease shall end, and that it ended, within the meaning of the covenant, by the surrender.

The judgment below should be reversed.

Judgment reversed.

BEASLEY, Ch. J., and DIXON, J., concurred.

DEPUE, J., dissenting, said: There is a distinction between a covenant to repair and keep in repair, and a covenant to deliver up the premises at the expiration of the term in as good repair as they were in at the beginning of the term. A covenant to repair and keep in repair requires the tenant to keep the premises in repair at all times during the term, and if they are out of repair at any time the lessor, upon such a breach, may sue during the term for the injury to the reversion. *Luzmore v. Robson*, 1 B. & Ald. 584; *Schieffelin v. Carpenter*, 15 Wend. 400; Wood Land. & Ten., § 370; 2 Platt Leases, 190. The removal of fixtures by the tenant, which he does not immediately replace, but which can be replaced before the end of the term, is not a breach of the covenant to keep in repair which will lay the foundation for an action on the covenant during the continuance

of the term. *Doe v. Davis*, 15 Jur. 155. Where the covenant is simply to yield up the possession of the premises at the expiration of the term, there can be no breach until the term is ended, for the tenant has the whole term within which to repair. Although the lessee is liable to an action before the expiration of his term on a covenant to keep the premises in good repair, on a covenant to leave them in as good state as he found them, no action will lie till the end of the term. *Platt Covenants*, 289. If houses be let to me for years, and I covenant to leave them in as good plight as I find them, and I throw down the houses, this is no breach of the covenant, for I may re-edify them, and therefore no action will lie upon this covenant until the end of the term. *Shep. Touch.* 173; § *Platt Leases*, 189; *Schieffelin v. Carpenter*, 15 Wend. 400.

The acts complained of, the removal of counters and shelving, painting a sign on the front of the building and staining the walls by heaping tobacco against them, were acts not inappropriate to the use of the building in the occupation and enjoyment of the premises by the tenant. These acts could only become wrongful, and a breach of the covenant sued on, by the tenant's neglecting to replace the counters and shelving, and to restore the front of the building and the walls to their original condition, and he had the full term specified in the lease within which to make the reparations. His covenant was not broken when the surrender was made and accepted. By the surrender the tenant's estate was absolutely determined. The termination of the tenant's estate before the expiration of the term extinguishes all covenants dependent on the interest enjoyed that were not broken when his estate was determined; for the land being gone, the covenant is annulled. *Platt Covenants*, 585. Thus in covenant against a lessee for years, upon a covenant that at the end of the term the tenant would leave and yield up the tenements well repaired, the defendant pleaded that one B. was seised in fee until by the plaintiff disseised, and that B. afterward re-entered and enfeoffed J. S., who is yet seised, etc., and it was adjudged on demurrer a good bar; for the land being gone, the obligation was discharged. *Andrews v. Needham*, Noy, 75; Cro. Eliz. 656; 6 Vin. Abr. 417, title "Covenant," 2. The effect of a surrender by mutual consent is to terminate the relation of landlord and tenant, and with it all covenants in the lease which had not then matured. *Shep. Touch.* 300; *Taylor Land. & Ten.*, § 518; *Bain v. Clark*, 10 Johns. 425, 427; *Deane v. Caldwell*, 127

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Mass. 243, 248. *Austin v. Moyle*, Noy, 118, does not sustain a contrary rule. The lease provided for a term of ten years, or a less term if the tenant should so elect and give a year's warning. There was no surrender in virtue of a new agreement between landlord and tenant. By the election of the tenant the lease itself became a lease for a shorter term, and the covenant to leave four acres fallowed and plowed at the end of the term applied.

Independent of the legal effect of the surrender upon the covenant of the tenant, of which there had been no breach up to the time of the surrender, the agreement of August twenty-ninth operated to discharge the defendant from the obligation to perform this covenant. The agreement contemplated the entire dissolution of the relation of landlord and tenant, and when executed by the acceptance of a surrender, produced that result. The only obligation reserved by the plaintiffs to be performed by the defendant was the payment of part of the overdue rent. The plaintiffs could not require the defendant, in addition thereto, to re-enter and repair the premises without adding a new term to the agreement.

I think that the covenant sued on was discharged by the surrender and its acceptance, and that the error of the court in receiving the evidence objected to was immaterial.

HUDSON TELEPHONE COMPANY V. JERSEY CITY.

(40 N. J. L. 303.)

Municipal corporation — license — revocation.

Under a statute authorizing telegraph companies to erect their lines in any streets in a city designated for that purpose by such city, a common council cannot revoke such a designation of the streets, when the company has conformed to the condition upon which the designation was made, and has expended money in placing poles upon the designated streets.

THIS writ brings up an ordinance to repeal an ordinance entitled "An ordinance to authorize the Hudson Telephone Company to erect posts or poles in certain streets of Jersey City." The opinion states the case.

Vredenburg & Garretson, for plaintiffs.

R. B. Seymour, for defendants.

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REED, J. The prosecutors are a corporation by reason of a certificate filed under the provisions of an act entitled "An act to incorporate and regulate telegraph companies" contained in Rev. 1174, and the supplement thereto, to be found in Pamph. L. 1821, p. 201.

The eighth section of the original act is as follows: "Any telegraph company organized by virtue of this act shall have full power to use the public roads or highways in the State on the line of their route for the purposes of erecting posts or poles on the same to suspend wires and other fixtures, upon first obtaining consent, in writing, of the owner of the soil; provided however no posts or poles shall be erected on any street of any incorporated city or town without first obtaining from the incorporated city or town a designation of the streets in which the same shall be placed and the manner of placing the same.

In accordance with these provisions an ordinance was passed by the common council of Jersey City and approved by the mayor April 1, 1884. The ordinance gave the company permission to erect posts and poles and to lay an underground cable in certain streets or portions of several streets. It contained conditions that no post should be erected in front of any building so as to interfere with the approach to the entrance of said building, nor without the permission of the property owner; that the company should conform to provisions of an ordinance concerning telegraph poles in the public street; that they should not interfere with gas, water or sewer pipes, and that before they commenced to excavate for the purpose of laying cable they should give a bond conditioned that the company would comply with all the conditions named in the ordinance, and save the city harmless from such acts as might injure third persons. These are, briefly stated, some of the conditions contained in the said ordinance.

It appears from the evidence taken in the cause that the company proceeded to place poles along the route marked out by the ordinance. They had placed from thirty-five to forty-five poles, at an expense of about \$10 a pole, and had expended other moneys in and about the erection of the poles.

Then was passed the ordinance brought up before us, which repeals the ordinance which confers permission to place the poles as above mentioned.

I am of the opinion that as a general rule a designation of streets by a city gives the company an irrevocable right to use the streets

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so designated for the purposes indicated in the statute. Certainly, after the expenditure of money in the erection of poles, made in reliance upon the municipal designation, the company obtains a vested right of which they cannot be stripped by a subsequent revocation of such designation.

The notion that a corporation, which under provisions similar to the present act has, upon the strength of a permission to use a certain route, spent thousands of dollars in laying railway tracks or subterranean cables, or in erecting posts and stretching wires, is at the mercy of the city authorities continually and entirely, is not to be entertained for a moment.

A view that the rights of the corporation are of so unsubstantial a character is opposed to all judicial sentiment, from the *Dartmouth College* case to the present time. *State v. Blake*, 6 Vroom, 208, and cases cited on page 215.

The power to repeal, suspend and alter charters contained in section 6 of the act concerning corporations (Rev. 178), does not reach the exercise of the authority attempted by the common council. No provision is contained in the act under which the prosecutors were incorporated which confers upon a municipality the power to revoke a permission once granted. The grant of the franchise to this company was subject only to a repeal or alteration by the legislature, and when that corporation had acquired vested rights in the mode designated by their charter, it certainly was not in the power of a common council to strip them of any right so acquired.

It was undoubtedly competent for the common council to couple with the permission such reasonable conditions as the occupancy of a public street by a telephone company's posts and wires suggest. And without such conditions the erection and maintenance of appliances of the business of the company would be subject to the reasonable control of municipal by-laws. Dill. Mun. Corp., §§ 555, 558, 575.

But that the common council has the power, at its mere will, to annul the act which has legalized the occupation of the streets, and so leave the company's property impressed with the character of a nuisance, which can be at once abated and their business thus destroyed, I cannot admit.

The power of a common council to revoke its permission given, by statutory authority, to the location of a railroad in the streets of a city was expressly denied in the case of the *People's Passenger R.*

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Co. v. Baldwin, 37 Leg. Int. 424, and in the case of the *Brooklyn Central R. Co. v. Brooklyn City R. Co.*, 32 Barb. 358.

I also understand the rule laid down in *Commonwealth v. Boston*, 97 Mass. 555, in reference to the right of municipal authorities to proceed against telegraph poles in a street as nuisances, after permission to so place them has once been granted, is in the same direction.

It is noticeable that there was no failure, in the present case, by the company to perform any required condition precedent to their occupation of the streets. The bond which they were to give was only to protect the city in case the company should excavate and lay cable wires, which if they could, under their charter, do at all, they have not done. There is no pretension that they failed in any other particular to conform to the requirements embodied in the ordinance conferring the permission.

[Omitting minor points.]

I am of the opinion that the ordinance brought up should be adjudged illegal. Let it be set aside.

KING V. PATTERSON.

(40 N. J. L. 417.)

Libel — privileged communication — mercantile agency report.

The publication, by a mercantile agency, of a notification sheet, which is sent to its subscribers irrespective of their interest in the plaintiff's standing and credit, is not a privileged communication, and the proprietors are liable for a false report of the plaintiff's financial condition in such publication.

ON error to the Supreme Court. Libel. The opinion states the case. The plaintiff had judgment below.

Philemon Woodruff and *Thomas N. McCarter*, for plaintiffs in error.

Flavel McGee and *Wm. Pintard*, contra.

DEPUE, J. Defamatory words uttered in a privileged communication are not actionable unless there be proof of actual malice. If such words are uttered *bona fide* on a privileged occasion, in an

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honest belief that they are true, the party injured is remediless. *Spill v. Maule*, L. R., 4 Exch. 222; *Clark v. Molyneux*, 3 Q. B. Div. 237. A wrong or malicious motive is essential to the action where the communication is privileged.

On the other hand, where the publication imputes a crime, so as to be actionable *per se*, or is actionable only on averment and proof of special damages, if the publication is not justified by proof of its truth or by the privileged occasion of publication, the law conclusively presumes malice such as is essential to the action. In such cases good faith and an honest belief in the truth of the publication will be no defense. The absence of a malicious motive may protect against exemplary damages, but will not bar the action. In a legal sense, malice, as an ingredient of actions for slander or libel, signifies nothing more than a wrongful act done intentionally, without just cause or excuse. Cooley Torts, 209, and note. A defamatory publication, under the pretext of a privileged communication, where the privilege does not exist, is a publication without just cause or excuse, and in a legal sense malicious and therefore actionable, though it be made without a malicious motive.

The burden of proving that the occasion of publication was privileged is on the defendant. The issue whether the words were published from a malicious motive, so as to take from them the protection of the occasion, arises only when it has been shown that the occasion of speaking or publishing is one that is privileged. Where the occasion is privileged it is for the plaintiff to establish that the statements complained of were made from an indirect or improper motive, and not for a reason which would otherwise render them privileged. *Clark v. Molyneux*, *supra*; Pollock Torts, 227-234.

The fundamental question in this case, upon which the issue hinges, is whether the notification sheet of November 5, 1884, containing the false statement on which the action is founded, was published and issued under such circumstances and in such manner as to bring it within the class of communications which the law denominates privileged communications.

The occasions which give rise to the privilege of speaking or publishing words which otherwise would be defamatory and actionable are various. Thus memorials to officers of State respecting the conduct of magistrates and officers, comments by electors upon the character of candidates for office, communications in matters of public interest in which the public generally is concerned, commu-

nications in the interest of third persons or for the protection of the party's own interest, communications respecting the character of servants or the credit and responsibility of tradesmen, or made in the performance of social, moral or legal duties, come within the class of privileged communications. Whether the privilege is available as a defense depends upon the circumstances of the particular case — the situation of the parties, the persons to whom, the circumstances under which, and the manner in which the communication was made. A publication which in one case would be justifiable, in another case would be without justification. A criticism of the public acts of a candidate for office may be inserted in a public newspaper or be proclaimed by a circular, but such publicity given to comments derogatory to the character of a servant or to the financial standing of a trader would be illegal. A person, with a view of obtaining information on a subject in which he has a personal interest, or in offering a reward for bills of exchange lost out of his possession, may in some cases justifiably insert in a newspaper an advertisement containing imputations upon the character of others, as in *Delany v. Jones*, 4 Esp. 191, and *Finden v. Westlake*, 1 Moody & M. 461. He may justifiably advertise in that public manner the discharge of an agent whose employment had been that of a general collection agent, as in *Hatch v. Lane*, 105 Mass. 394, but such publicity to the discharge of his cook or his butler would be without justification. In some instances a voluntary imparting of information will be justified; in other cases the privilege applies only to information in response to inquiries. The subject may be one that is privileged, and a communication on that subject be unprivileged if the restraints and qualifications imposed by law upon the publicity to be given the communication be not observed. If such restraints and qualifications are disregarded, the communication is unprivileged and actionable, though made from the best of motives. In such cases good faith and honest belief will be no defense. The act of communicating defamatory matter to persons with respect to whom there is no privilege is an act without legal justification or excuse, and therefore actionable.

When the restraints and qualifications imposed by law upon the publicity to be given to the publication are shown to have been observed, it is then, as was said by the court in *Laughton v. Bishop of Sodor and Man*, L. R. 4 P. C. 509, "all we have to examine is whether the defendant stated no more than he believed or might

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reasonably believe; if he stated no more than this he is not liable." Expressions of similar import are frequent in judicial opinions, but they have uniformly been preceded or accompanied by a judicial determination that the manner of publication was such as to make the communication privileged. No judicial precedent has ever treated good faith and honest belief, standing alone, as a justification of defamatory words.

The plaintiff was engaged in the retail clothing business, at Red Bank, in the county of Monmouth. The defendants conduct a mercantile agency in the city of New York. Their business consists in collecting information as to the credit and financial standing of dealers throughout the country. Four times a year they publish a book of ratings called the "reference book," and twice in each week a notification sheet called the "mercantile agency notification sheet." In the notification sheet of November 5, 1884, there was published this information: "New Jersey. Red Bank. Patterson, Emma. Chattel mortgage, Samuel Ludlow, \$1,385. Clothing." The publication was false, and for the injury to the plaintiff's business occasioned by it this suit was brought.

The suit is an action by a trader for a false statement concerning her credit, and the defense that the publication was privileged must be decided upon those legal rules that give a privilege to communications of that character.

The trial judge charged that a communication made *bona fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty, although it may contain criminary matter, which without this privilege would be slanderous or libellous and actionable.

This instruction was taken from the opinion of the Queen's Bench, in *Harrison v. Bush*, 5 El. & B. 344. It conforms to the rule adopted in *Whiteley v. Adams*, 15 C. B. (N. S.) 392, and in *Laughton v. Bishop of Sodor and Man*, L. R.; 4 P. C. 495, in every respect material to this suit, and accords with the decision of the Court of Exchequer in *Toogood v. Spyring*, 1 C., M. & R. 181. In the latter case the defendant, a tenant of the earl of Devon, required some work to be done on the premises occupied by him, and the plaintiff, who was generally employed by Brindson, the earl's agent, as a journeyman, was sent by him to do the work. He did it, but in a negligent manner, and during the progress of

the work became intoxicated, and some circumstances occurred which induced the plaintiff to believe that he had broken open the cellar door and so obtained access to his cider. The court held that the communication of these facts to Brinsden, the agent of the earl, who in virtue of his employment had a duty to perform in the premises, was privileged, but that a communication at another time to one Taylor, a third person, who had no interest in the subject-matter, and no duty to perform in reference to it, was not privileged. The judgment of the court in *Toogood v. Spyring* sanctions the rule adopted by the trial judge in the case.

The defendants were engaged of their own volition and for their own profit in the business of collecting and disseminating information as to the character, credit and pecuniary responsibility of traders throughout the United States. Their course of business was to transmit a copy of the record book and the semi-weekly notification sheet, containing the information they collected, to each of their subscribers, who paid the required annual subscription and signed a contract to hold such communications as confidential, without regard to the existence or non-existence of an interest by the subscribers in the information communicated. The number of subscribers to whom the record book and notification sheets were sent does not appear in the case. Mr. Dun, the principal proprietor, testified that it was impossible for him to say how many copies were issued, as there were a number of branch offices, and of the number of their subscribers he had no knowledge. Enough appeared to show that the defendant's business of collecting and disseminating information is extensive, and that the number of subscribers to whom such information is communicated is very large. It appeared that one Myers, a creditor of the plaintiff, saw the notification sheet of November 5, 1884, in the hands of Lisberger & Weiss, merchants doing business in Philadelphia, and that Lyons, another creditor, saw another copy of it on the desk of Simons & Co., in New York city. In consequence of the information contained in this sheet, Myers and Lyons went to Red Bank and demanded payment or security for their debts. The plaintiff's credit was thereby destroyed, and her business was broken up. Myers and Lyons were not subscribers of the defendants. Lisberger & Weiss had, some two years before, sold goods to the plaintiff, but the account was closed at that time. It did not appear that Simon & Co. ever had dealings with the plaintiff. Neither of these persons had, at the time the sheet was pub-

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lished, any business interest in the credit or financial standing of the plaintiff.

The trial judge applied the rule of law he adopted by an instruction in these words: "Had then Lisberger & Weiss an interest in knowing the financial condition and solvency of the plaintiff? Or had Simon & Co., in New York, such interest? Or had either party — the defendants, or Lisberger & Weiss, or Simon & Co. — a duty with reference to the condition of the business affairs as between themselves? If they had, then such communication, made *bona fide*, with the guard by contract and other stipulation between the parties appearing in evidence, would be privileged. If there was no such interest or duty between the defendants and these subscribers, then they may be liable, as the publication was not privileged as to them, or to others who obtained it through them. If a request was made, either express or implied, by Lisberger & Weiss, or by Simon & Co., for such communication as to the plaintiff, then, if they had no interest in the matter, the book or sheet sent to them, or either of them, affecting her credit, would not be privileged. If made without such request, then the communication voluntarily sent by them must be at their risk as to the harm that may be done thereby. I think it is enough to hold, in this case, that the agency has the protection of the privilege in every case where the subscriber has a direct and personal interest in the person who is the subject-matter of inquiry, and that in all other cases they must stand as others, on the truthfulness of their report, and their protection under the contracts with subscribers not to divulge the secrets of their business."

In this discussion my citations will be limited to such cases as are regarded as leading cases, or are germane to the case before the court, with a view to distinguish or apply such decisions to the case in hand.

In *Capital and Counties Bank v. Henty*, 7 App. Cas. 741, the defendants, who were brewers, had printed a circular in these words: "Messrs. Henty & Sons hereby give notice that they will not receive in payment checks drawn on any of the branches of the Capital and Counties Bank." This circular they sent by post to persons residing in various places in Sussex and neighboring counties, who were either tenants of or purchasers of beer from the defendants. The circular became known to other persons, and there was a run on the bank. The bank sued Henty & Sons for a libel, with an innuendo that the circular imputed insolvency. It appeared in the case

that the practice of the defendants had been to collect from time to time, through their travellers, moneys due from their tenants and customers, and to accept payment by checks on local banks. Among the checks which in the ordinary course of business were likely to come into the hands of these persons, and which they might be likely from time to time to offer in payment to the defendants, some might be drawn upon the different branches of the plaintiffs' bank. The circular, as was said by Lord SELBORNE, related to the defendants' mode of conducting business between them and their tenants and customers, as to which it was proper that their debtors should be informed, and as the defendants were entitled to decide for themselves what checks they would accept or decline from their debtors, such a communication to their tenants and customers, if made *bona fide*, was privileged. The case however was decided in the House of Lords on the question whether the proof was sufficient to sustain the innuendo that the circular imputed insolvency. The court held that the words of the circular, in their natural meaning, were not libellous; that the inference suggested by the innuendo was not the inference which reasonable persons would draw, and that the circumstances attending the publication did not show that the circular had a libellous tendency. Speaking of the fact that some of the persons who received the circular did in fact show it to strangers, Lord SELBORNE said: "I do not think that any such communication by them to strangers, unauthorized by the defendants themselves, could properly be evidence in support of the innuendo." He added: "If it had been publicly placarded by the defendants, on the walls of Chichester or other towns, or had been advertised by them in newspapers, or sent by them through the post to persons with whom they had no business relations, this might have been evidence of a malicious intention, beyond what was expressed by the mere words of the document."

The case cited is distinguished from that in hand in the circumstance that the circular in that case did not bear on its face a construction imputing insolvency, and was sent only to persons having an interest in the subject; whereas in this case the statement in the notification sheet plainly affected the plaintiff's financial standing, and was sent to all subscribers promiscuously, without regard to their interest in that subject.

In *Lawless v. Anglo-Egyptian Oil Co.*, L. R., 4 Q. B. 262, an action for libel was brought against a corporation for publishing a

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report made to the company by auditors in their audit of the managers' account, reflecting upon the plaintiff. The report was submitted at a general meeting of the shareholders of the company, and under a resolution of the meeting was printed and circulated among the shareholders. The court held that inasmuch as it was the interest of all the shareholders to be informed of the report, the printing and such publication of it were privileged on the ground, as was said by MELLOR, J., "that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous." It will be observed that the gravamen of the action was the publication to the shareholders, persons immediately interested in the report, and that no other publicity had been given to the defamatory matter except to the printer by whom it had been printed. In *P., W. & B. R. Co. v. Quigley*, 21 How. 202, a report made to stockholders in writing, and printed, with respect to the capacity and skill of one of the company's employees, the superintendent of the company's railroad, was held to be a privileged communication; but it was also held that the privilege did not extend to the preservation of the report in a book for distribution among the persons belonging to the corporation or the members of the community.

These cases are simply illustrations of the principle that a communication made upon a subject-matter in which the party communicating has a duty is privileged when made to persons having a corresponding interest in it, and they illustrate how carefully the privilege is restricted within the bounds reasonably necessary to effect the communication to the parties actually interested. So strictly is this limitation within reasonable bounds enforced, that in *Williamson v. Freer*, L. R., 9 C. P. 393, the transmission unnecessarily, by a post-office telegram, of libellous matter which would have been privileged if sent in a sealed letter, was held to avoid the privilege, although the post-office clerks through whose hands it would pass were prohibited, under severe penalties, from disclosing telegrams passing through their hands, the principle of the decision being that publication was thus made to persons in respect of whom there was not any privilege. Pollock Torts, 234.

The defendants' dissemination of the notification sheets among their subscribers as a class, being intentional and in the regular course of their business as it was conducted, it is not necessary to consider whether *Tompson v. Dashwood*, 11 Q. B. Div. 43, in which

it was held that a communication intended to be made on a privileged occasion was privileged where, by the sender's negligence in putting letters in wrong envelopes, the communication was sent to a stranger to the occasion, was correctly decided. It will be observed that in *Tompson v. Dashwood*, the misdirected letter was sent to the plaintiff's brother, and in fact caused no special injury to the plaintiff. It may also be remarked that Mr. Pollock, in his recent treatise on Torts, disapproves of this case as a decision by no means universally accepted by the profession as good law, and as contrary to the earlier decisions. Pollock Torts, 216, 234. A defendant intends to send a communication derogatory to the plaintiff's character or circumstances to A., where it would do no harm. By inadvertence he sends it to B., which produces the injury complained of. It is obvious that it would be a plain transgression of legal principle to excuse the act he did because he intended to do an act from which no injury to the plaintiff would have resulted, and thus visit upon an innocent sufferer the consequences of the heedless act of the wrong-doer which occasioned the injury.

I turn now to the judicial precedents directly in point.

In *Beardsley v. Tappen*, the defendant conducted a mercantile agency for furnishing information to subscribers, under rules and regulations for maintaining the personal and confidential character of communications to subscribers similar to those in the defendants' contract with their subscribers. The plaintiff sued in an action for libel, for communicating false information with respect to the plaintiff's financial condition. The words in question had been entered in the defendant's record book by his clerks and had been read by them to clerks of subscribers sent by their employers to make inquiries. The trial judge instructed the jury that no person other than the merchant himself, asking for information, had in law a right to read or hear said words, and that the reading of said words by any person in defendant's employ, with his permission, or the reading of said words by defendant himself, or by any person in his employ, to the clerk of a merchant subscriber requesting information concerning the plaintiff, was an unlawful publication, not at all within or protected by the rule of law as to privileged communications. The plaintiff having obtained a verdict, Mr. Justice NELSON, in denying a motion for a new trial on the ground of misdirection, held that the principle upon which privileged communications rest imported confidence and secrecy between individuals,

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and was inconsistent with the idea of a communication made by a society or congregation of persons, or by a private company or a corporate body. The facts and the charge of the trial judge are reported in 1 Am. Lead. Cas. 205, and the opinion of Mr. Justice NELSON in 5 Blatchf. C. C. 407. The judgment was reversed in the Supreme Court of the United States, no opinion having been expressed on this subject.

The charge of the trial judge and the reasoning of Mr. Justice NELSON place unreasonable restrictions upon the doctrine of privileged communications. Agents to collect information, clerks to record it and to communicate it to subscribers, on the one hand, and confidential clerks to receive the information in the interest and by the authority of subscribers, on the other hand, are absolutely necessary to the usefulness, if not the existence, of these institutions. The employment of clerks who obtain thereby such information as their duties necessitate — like the intervention of the printer where printing a report is, in the judgment of the court, a reasonable method of communicating to a large body of interested persons, as the shareholders of a corporation — does not take from the transaction its character as a privileged communication.

Other cases have placed the subject on more reasonable grounds. In *Ormsby v. Douglass*, 37 N. Y. 477, the defendant kept a mercantile agency, to obtain information respecting the credit and responsibility of persons in trade, and furnish the same to subscribers. A subscriber who held a note against the plaintiff, personally applied to the defendant's office for information concerning the plaintiff. The record books were examined by the defendant's clerks, and the information was given. The statement complained of was made orally to one interested in the information, upon personal application at the defendant's office. The Court of Appeals of New York held the communication to be privileged. On the other hand, the same court held that a communication made by a person engaged in the business of a mercantile agent, to subscribers, which was not confined to such of them as made inquiries of him, but was printed by his procurement and distributed by him to subscribers who had no special interest in being informed of the condition of the plaintiff's firm, was not privileged. *Taylor v. Church*, 4 Seld. 452.

The question was again considered in that State, by the new Court of Appeals, in *Sunderlin v. Bradstreet*, 46 N. Y. 188; s. c., 7 Am. Rep. 322. The suit was against the proprietors of a mercantile

agency. The defendants published a semi-annual volume containing the names of persons and firms doing business in various parts of the United States and Canada, and information in reference to their financial condition, and also a weekly sheet of corrections, which was sent to their subscribers in the city of New York and in the country, by mail. In this weekly sheet they published that the plaintiffs had failed. The publication was false. The question was whether the publication was a privileged communication. Mr. Justice ALLEN, in the opinion of the court said: "A communication is privileged within the rule when made, in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the party to whom the communication is made has an interest in it, and the party by whom it is made stands in such relation to him as to make it a reasonable duty, or at least proper, that he should give the information. * * * In the case at bar it is not pretended but that few, if any, of the persons to whom the ten thousand copies of the libellous publication were transmitted had any interest in the character or pecuniary responsibility of the plaintiffs, and to those who had no such interest there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who without cause publish defamatory matter of others; that is of proving the truth of the publication, or responding in damages to the injured party. The communication of the libel to those not interested in the information was officious and unauthorized, and therefore not protected, although made in the belief of its truth, if it were, in point of fact, false. * * * In those cases in which the publication has been held privileged the courts have held that there was a reasonable occasion or exigency which for the common convenience and welfare of society fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications." The court held that information communicated, not merely to persons interested in it, but published to all persons who might be subscribers to the scheme of publication, was not privileged.

The decisions in the Federal Circuit Courts are in coincidence with those of the courts of New York. *Erber v. Dun*, 12 Fed.

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Rep. 526; *Trussell v. Scarlett*, 18 Fed. Rep. 214; *Locke v. Bradstreet Co.*, 22 Fed. Rep. 771. Against these authorities I find neither judicial decision nor *dictum*.

I concur in the result reached in *Sunderlin v. Bradstreet*, and in the reasoning upon which the judgment was founded. The defendants can claim no additional privilege in virtue of the business in which they are engaged. Their business is a lawful business, but as was said by the court in *Sunderlin v. Bradstreet*, "in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others." The publication of defamatory matter affecting third persons, in a business prosecuted for personal gain, can be tolerated only on grounds of public convenience. The rights of individuals ought not to be made to yield to the exigencies of such a business more than public interests require. Public interests will be adequately conserved by extending the immunity of privileged communications only so far as to embrace communications to subscribers who have a special interest in the information. This restriction lays no unreasonable restraint upon the business of these agencies in collecting and communicating information in the interest of the public. Society is organized and courts are established for the protection of the rights of individuals. Unrestrained by those legal principles which control the acts and conduct of other persons under like circumstances, these agencies, in the vastness of their operations, are capable of becoming instruments of injustice and oppression so grievous that public policy would require their entire suppression.

Nor can the defendants acquire a larger measure of immunity by reason of their contracts with their customers to hold the information as confidential. The contract of the defendants with their subscribers is *inter sese*. In fact it affords no protection against injury by false reports. The manner in which these reports are disseminated renders protection to the public under the terms of the subscribers' contracts a delusion. Each of the subscribers has a printed copy to retain in his possession. Myers testified that although not one of the defendants' subscribers, he nevertheless had seen their reports twice a week right along, sometimes only once a week and sometimes twice a week; that during the last ten years he had seen their notification sheets thousands of times, and that any reputable merchant could get hold of their sheets, whether

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he is a subscriber or not. Others of the plaintiffs' creditors who were not defendants' subscribers testified that they had frequently seen the defendants' notification sheets, and some that they had seen the sheet of November 5, 1884. The injury to the plaintiff from the false report resulted from the manner in which the defendants disseminated their publications. It has been held that damage occasioned by the unauthorized repetition by a third person of defamatory words uttered orally is too remote to support an action against the original utterer of them, where the words are actionable only by reason of special damage, *Ward v. Weeks*, 7 Bing. 211. This case and the cognate case of *Vicars v. Willcocks* have been criticised. 2 Smith Lead. Cas. (8th ed.), 552. The principle held in that case, if sound, has never been applied to written or printed libels, nor is it applicable to defamatory matter published in that manner. The correct principle to apply to such publications is that the original publisher is answerable in law for all the consequences of his wrongful act which were reasonably to be foreseen, and which were the result in the usual order of things of such wrongful act. *Hughes v. McDonough*, 43 N. J. L. 460; Pollock Torts, 463.

The rule adopted by the learned judge in defining the qualifications and limitations upon publications affecting credit and financial standing, which would make such publications privileged communications, was correct. His application of the rule to the facts of this case was as favorable to the defendants as they were entitled to have. His ruling with respect to the liability of the defendants for damages resulting from their wrongful acts was also correct.

The other exceptions have been examined. It is sufficient to say we find in them no error which would justify a reversal.

The judgment should be affirmed.

VAN SYCKEL, J. (dissenting). The alleged libellous publication was a printed communication published by a commercial agency in the city of New York, of which the defendants below were members. The publication was contained in what is known as a "notification sheet," by which the agency communicated to its subscribers information affecting the financial standing of merchants and traders in various parts of the country. The plaintiffs below complained that in one of such notification sheets it was falsely stated that she had put a chattel mortgage on her stock of merchandise.

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The case shows that every subscriber to the commercial agency was required to enter into and did enter into a written agreement with the agency that all communications made by the agency, either verbally or through notification sheets, should be strictly confidential, and should be exclusively confined to the business of such subscriber's establishments. The information furnished is declared in this contract to be furnished to subscribers on request, for use in their business, as an aid to them in determining the propriety of giving credit.

The trial court ruled that the agency had the protection of privilege in every case where the subscriber had a direct and personal interest in the person who is the subject matter of inquiry, and that in all other cases they must stand, as others, on the truthfulness of their report and their protection under the contracts with subscribers not to divulge the secrets of their business.

Malice, express or implied, is absolutely essential to support an action for defamation. If a man writes and publishes of another that which is false and defamatory, the law will usually imply malice on his part without any evidence of express malice. But there are many occasions on which one may publish of another that which proves to be untrue, when the legal implication of malice will not arise. In such cases the publication is not actionable unless express malice can be shown. This leads to the consideration of the much discussed doctrine of privilege.

The term "privileged," as applied to a communication alleged to be libellous, means simply that the circumstances under which it was made are such as to repel the legal inference of malice, and to throw upon the plaintiff the burden of offering some evidence of its existence beyond the mere falsity of the charge. SELDEN, J., in *Lewis v. Chapman*, 16 N. Y. 369.

Baron PARKE, in *Wright v. Woodgate*, 2 O., M. & R. 573, has clearly defined the term. He says: "The proper meaning of a privileged communication is only this, that the occasion on which the communication was made rebuts the inference *prima facie* arising from a statement prejudicial to the character of the plaintiff, and puts it upon him to prove there was malice in fact—that the defendant was actuated by motives of personal spite or ill will, independent of the occasion on which the communication was made."

The rule is founded in public policy, and has been liberally applied.

In *Waller v. Lock*, 45 L. T. (N. S.) 243, JESSEL, master of the rolls, says: "If an answer is given in the discharge of a social or moral duty, or if the person who gives it thinks it to be so, that is enough; it need not even be an answer to an inquiry, but the communication may be a voluntary one."

He further observes in the same case: "It appears to me that if you ask a question of a person whom you believe to have the means of knowledge about the character of another with whom you wish to have any dealings whatever, and he answers *bona fide*, this is a privileged communication."

In *Toogood v. Spyring*, 1 C., M. & R. 181, 184, Baron PARKE says: "If such publications * * * be fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned, in such cases the occasion prevents the inference of malice which the law draws from unauthorized communications. * * * If fairly warranted by any reasonable occasion or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

To the like effect is the expression of Lord ELLENBOROUGH, in *Delany v. Jones*, 1 Esp. 193: "Though that which is spoken or written may be injurious to the character of the party, yet if done *bona fide*, as with a view of investigating a fact in which the party making it is interested, it is not libellous."

In *Laughton v. The Bishop*, L. R., 4 P. C. 504, the House of Lords ruled that "a communication made *bona fide* upon any subject-matter, in which the party communicating has an interest, or in reference to which he has or believes he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contains criminary matter which without that privilege would be defamatory and actionable."

Mr. Justice SELDEN, in *Lewis v. Herrick*, *supra*, states the doctrine even more broadly: "Where the circumstances show that the defendant may reasonably be supposed to have had a just and worthy motive for making the charge, then the law ceases to infer malice from the mere falsity of the charge, and requires from the plaintiff other proof of its existence."

Weatherstone v. Hawkins, 1 T. R. 1105, was an action by a discharged servant against his former master for words spoken by him

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to one Rogers, who applied for information about the servants' character. There was a count also for libellous words contained in a letter written by defendant to one Collier after Rogers had declined to employ plaintiff. This letter accused plaintiff of embezzlement. This letter was not written in reply to a request by Collier for information, nor under an injunction of secrecy; its sole purpose seems to have been to vindicate the defendant for uttering the previous defamatory words to Rogers, and thus to prevent a suit by plaintiff. Lord MANSFIELD, in deciding the case, said: "I have held, more than once, that an action will not lie by a servant against his former master for words spoken by him in giving the character of a servant." The general rules are laid down, as Mr. Wood has stated, but to every libel there may be a necessary and implied justification from the occasion, so that what, taken abstractly, would be a publication, may, from the occasion, prove to be none—as if it were read in a judicial proceeding. Words may also be justified on account of the subject-matter or other circumstances. In this case, instead of plaintiff's showing it to be false and malicious, it appears to be incidental to the application by Rogers to the master of the servant. And the letter was written to the brother-in-law of the plaintiff for the express purpose of preventing an action being brought.

Hewer v. Dawson, Buller N. P. 8, was an action for saying of the plaintiff, who was a tradesman, "he cannot stand it long; he will be bankrupt soon." Special damage was laid in the declaration that one Lane had refused to trust the plaintiff for a horse. Lane, the person named in the declaration, was the only witness called for the plaintiff. It appeared in his testimony that the words were not spoken maliciously, but in confidence and friendship to Lane, and by way of warning him, and that in consequence of that advice he did not trust the plaintiff with the horse. Chief Justice PRATT said that "though the words were otherwise actionable, yet if they should be of opinion that the words were not spoken in malice, but in the manner before mentioned, they ought to find the defendant not guilty."

It did not appear that the defendant was applied to for the information or that he had any interest in the transaction other than a friendly disposition to warn Lane of the risk.

McDougall v. Claridge, 1 Campb. 267, was for a libel on the plaintiff in his profession as a solicitor. The libel was a letter

written by defendant to bankers at Nottingham, charging the plaintiff with improper conduct in the management of their affairs. It appeared however that the letter was intended as a confidential communication, and that the defendant was himself interested in the affairs which he supposed had been misconducted. Lord ELLENBOROUGH held that the action would not lie; that it was impossible to say that the defendant had maliciously published a libel to aggrieve the plaintiff, if he was acting *bona fide*, with a view to the interests of himself and of the persons whom he addressed.

In the case of *Toogood v. Spyring, supra*, Baron PARKE decided that if a former master, when applied to, gives the character of a discharged servant in the presence of a third person not interested, the communication, if made *bona fide*, is privileged.

In the subsequent case of *Kins v. Sewell*, 3 M. & W. 302, he expressed his conviction that the law had been properly laid down in the previous case.

Lawless v. Anglo-Egyptian Cotton Company, L. R., 4 Q. B. 262, was an action against a joint stock company, the directors of which had published in the form of a printed circular, issued and sent to all the stockholders, the report of an auditing committee appointed to make an investigation into the finances of the company. The report contained defamatory statements concerning the plaintiff, who had been manager of the association. It was held that under these circumstances the presumption of malice did not arise, and the plaintiff was therefore nonsuited.

The following cases show that in the authorities heretofore cited the rule has been correctly enunciated. *Bank v. Henty*, 7 App. Cas. 741; *Tompson v. Dashwood*, 11 Q. B. Div. 43; *Tuson v. Evans*, 13 Ad. & El. 733; *Philat. W. & B. R. v. Quigley*, 21 How. 202; *Finden v. Westlake*, 1 M. & M. 461; *Hatch v. Lane*, 105 Mass. 394; *Brow v. Hathaway*, 13 Allen, 239; *Somerville v. Hawkins*, 10 O. B. 580.

These cases show that all that is necessary to entitle such communications to the claim of privilege is that the relation of the parties should be such as to afford a reasonable ground for supposing an innocent motive for giving the information and to deprive the act of the appearance of an officious intermeddling with the affairs of others. *Van Wyck v. Aspinwall*, 17 N. Y. 190; *Klinck v. Colby*, 46 N. Y. 427; s. c., 7 Am. Rep. 360.

The cases heretofore cited have been considered without reference to mercantile agency cases.

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The trial judge adopted the rule laid down in *Sunderlin v. Bradstreet*, 46 N. Y. 188, and in *Erber v. Dun*, 12 Fed. Rep. 526, both of which are commercial agency cases.

In other cases of this character a different view has been held.

In *Trussell v. Scarlett*, 18 Fed. Rep. 214, Judge MORRIS ruled that a notification sheet of R. G. Dun & Co., sent to a subscriber, containing a charge of bankruptcy against plaintiff, was a privileged communication. To this case Dr. Wharton has appended a note maintaining the view that if the agency confines itself to the confidential communication of such information to its customers, then if it acts *bona fide*, and without malice or recklessness, these communications are privileged, and the defendant, if sued for libel, would be entitled to a verdict.

The same opinion was entertained by Judge NELSON in *Locke v. Bradstreet*, 22 Fed. Rep. 771; by Judge DEWEY in *Billings v. Russell*, 8 Boston Law Rep. (N. S.) 699, and by the Wisconsin court in *State v. Lonsdale*, 48 Wis. 848.

The underlying principle of many cases cited, in my judgment, condemns *Sunderlin v. Bradstreet* and *Erber v. Dun*, and extends the rule of privilege to all communications, spoken or written, *bona fide*, in the performance of what may reasonably be considered a duty to the public or to an individual, and also to communications required by a common interest; or by the relation in which the persons, between whom the communication is made, stand to each other. A false, defamatory publication must, when no other adequate motive appears, be attributed to malice; but whenever the attending circumstances are such as to lead a reasonable and just mind to reject the presumption of actual malice, an essential requisite to the support of the action for libel disappears.

It is this consideration of what justly may and what may reasonably be presumed to actuate the conduct of men, that has led the judicial mind to introduce and apply the doctrine of privilege. The conceded instances in which this protection is accorded are not rare. Words spoken by a member in a legislative assembly; by one upon the subject-matter before a religious meeting; by counsel in the conduct of a cause; by one in response to inquiries by a friend concerning a physician, a lawyer or a tradesman, and by a former master to one who desires to know the character of a servant. Words thus spoken are not actionable *per se*; the presumption of malice is excluded, because it is not reasonable to suppose that it is present.

No case has been cited, and I think none exists, where the plaintiff has been permitted to make an issue of the fact, whether the person applying to a former master in regard to the character of a servant had in truth an interest in knowing. It has been deemed sufficient to put the case within the rule of privilege, that application was made and the answer given *bona fide*. Nor has any consideration been given to the magnitude of the interest which elicited the inquiry, or whether the interest was present or prospective. Nor in the case of master and servant, has the master ever been held to any accountability for failing to use reasonable care to inform himself that the inquiry was made in good faith.

Where inquiry is made of the master by one person at the solicitation of another, and where a tradesman inquires as to the responsibility of persons he may hope will sometime offer to deal with him, although he has no direct present interest in them, communications in reply seem to be clearly within the principle of the protecting rule.

It is now almost universally conceded that mercantile agencies are of great utility and advantage, if not absolutely essential, to those engaged in conducting the business and commerce of the country over the wide field where their enterprise leads them. The strict rule applied in the court below, if it does not tend to suppress, will go far to destroy the purpose and utility of these institutions.

It may be said that in New York the rule in *Sunderlin v. Bradstreet* has been productive of no such result. But there the pledge of secrecy has hitherto saved the agencies from a disastrous flood of civil suits and criminal prosecutions, which they could not have survived. Experience there furnishes proof, not of the wisdom of the rule, but that it is wise not to enforce it. There is no consideration of public policy which commends the application to them of an illiberal rule.

If immunity is accorded to the master making statements concerning his servant, when in fact the inquiry is made by one who does not intend to employ the servant, and if malice is not presumed to exist where a merchant makes inquiry of his neighbor or friend concerning the pecuniary responsibility of those with whom he may in the future have transactions, how can the doctrine of privilege be restricted, in this controversy, to cases where the subscriber has a present direct and personal interest in the person who is the subject of inquiry?

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Business interests are so ramified at this day that large enterprises cannot be successfully conducted without a comprehensive survey of the whole field of industry. The manufacturer must have some knowledge of the financial condition of those who are his rivals in business, as well as of those who may be induced to purchase his productions, in order that he may act judiciously in fixing his limit of production. The dealer in brewer's grains, in order to determine the extent of his purchases, must know something of the business of his consumers, their pecuniary ability to purchase, and the probable volume of business in the district of country over which his transactions extend. In fact, every man who has merchandise to sell is to some extent interested in knowing how every man in the country stands in credit.

Though one is not a customer to-day, he may be to-morrow. Orders are given by letter, by telegram, by telephone, or in person, requiring immediate response. It involves the use of the mercantile agency sheets, the loss of the customer, or the risk of selling blindly.

The subscribers to the commercial agency in effect say to it: "We have an interest in knowing the financial condition of all business men whose standing you report; we assure you of our good faith by being willing to pay you for that information, and we pledge ourselves to receive it as a confidential communication." These circumstances, repellant of the presumption of malice, constitute the substance and essence of privileged communications.

How under these conditions can the obligation be imposed upon the agency to make sure that the subscriber has a present interest in the persons reported, without narrowing the privilege, which has operated as a shield in the many cases referred to?

Business methods have changes; every department of human activity is marked by progress. There must be a correct apprehension of legal principles as they apply to a progressive state of society if we would keep pace with the march of events, and render the common law as true and unerring a guide in jurisprudence to-day as it has been in the past. It is the pride of the common law that it is sufficiently broad and elastic to adapt itself to the exigencies of the times, and to adjust itself to the new and ever-varying conditions that may arise in the progress of the age.

The rule that a business man may inquire of his friend or his neighbor as to the responsibility of one who has applied for credit,

answered well enough fifty years ago, but it is altogether inadequate to the present requirements of trade and commerce.

The law of *Sunderlin v. Bradstreet* would even suppress the prevalent practice in business circles of employing a credit clerk, to ascertain and report the standing of business men in the district which he canvasses. No man could safely answer his inquiries and the clerk could not report to his employer, without being liable to prosecution. The old adjudications, relied upon to support the more narrow rule, are the declarations of judges whose vision did not take in the widely different conditions which prevail in the affairs of men to-day. This doctrine utterly disables the agency to become capable of imparting even the information which it is conceded may lawfully be given. If the agency may furnish only to one having a direct interest, how would any one dare give the information to the agency, for until some one having such interest has applied to the agency, the communication is within the prohibited class?

In my opinion, the defendants, in furnishing information to subscribers under the conditions imposed, are not subject to the presumption that they were moved by malice, and I therefore vote to reverse the judgment below.

For affirmance—The CHANCELLOR, CHIEF JUSTICE, DEPUY, KNAPP, PARKER, BROWN, COLE, MCGREGOR, PATERSON. 9.

For reversal — DIXON, MAGIE, VAN SYCKEL, CLEMENT, WHITAKER. 5.

GRANDIN V. GRANDIN.

(49 N. J. Law, 508.)

Compromise — consideration — withdrawing opposition to will.

Where a beneficiary under a will had filed a *caveat* against the probate, and in consideration of his withdrawing opposition and assigning his interest in the testator's estate beyond the provision for his benefit in the will, the residuary legatee agreed to pay him \$300 and assign him certain stock, and paid the money but refused to assign the stock, *held*, that in an action for the breach the plaintiff need not aver that his interest under the will was not equal to his share of the estate as heir and next of kin.*

ACTION for breach of contract. The opinion states the case.

* See *Bellows v. Soules* (55 Vt. 391), 45 Am. Rep. 631.

Grandin v. Grandin.

Voorhees & Cutter, for plaintiff.

H. A. Fluck and *J. A. Bullock*, for defendant.

DEPUE, J. The parties to this suit are children and heirs at law and of the next of kin of John Grandin, deceased. The agreement sued on was made on the settlement of a dispute over the probate of the will of the deceased.

The declaration alleged in substance that the plaintiff and defendant were children of John Grandin, deceased; that the deceased died seised and possessed of real and personal estate; that the deceased by his will made some provision for the plaintiff, and made the defendant a residuary legatee; that the plaintiff filed a *caveat* against the probate of the will; that in consideration that the plaintiff would withdraw the *caveat* and make no further opposition thereunder to the probate of the will, and would also assign to the defendant and one J. F. G. all his (the plaintiff's) right, title and interest in the real and personal estate of the deceased, other than the interests the plaintiff had under the will, the defendant promised and agreed to pay plaintiff the sum of \$300, and also to assign to the plaintiff two hundred shares of the capital stock of the Lehigh Valley Railroad Company. The declaration avers that the plaintiff withdrew the *caveat*, and made no further opposition thereunder to the probate of the will, and assigned his right, title and interest in the real and personal estate of the deceased, in conformity with his agreement, and that the defendant paid the \$300, but refuses to assign the plaintiff the said stock. Breach, refusal to assign, etc.

The ground of demurrer is that the declaration does not contain a sufficient allegation of consideration to support the promise.

The compromise of a doubtful claim actually in suit is in law a sufficient consideration to support a promise, if the agreement to compromise operates as an extinguishment of the claim of the promisee. The extinguishment of the promisee's rights in the premises by force of the compromise is in such cases the benefit to the promisor which gives it the effect of a consideration. *Conover v. Stillwell*, 5 Vroom, 54, 58. This general rule is admitted. The contention is that the declaration fails to aver such substance in the plaintiff's rights in the premises as will bring this case within the operation of the rule. The filing of a *caveat* by the plaintiff in

the surrogate's office was the commencement of a judicial contest over the will in the Orphans' Court. It was therefore the commencement of a suit by the plaintiff to contest the defendant's right as residuary legatee. The plaintiff's rights in the property of the deceased as an heir at law and one of the next of kin gave him a standing in court to litigate the will. The withdrawal of the *caveat* did not restore the jurisdiction of the surrogate to admit the will to probate, and litigation over the will might, notwithstanding the plaintiff's act, be resumed in the Orphans' Court by other persons interested. *Slocum v. Grandin*, 11 Stew. Eq. 485; s. c., 13 Stew. Eq. 342. But the declaration avers that in addition to withdrawing the *caveat*, the plaintiff did, in conformity with the agreement, assign all his right, title and interest in the real and personal estate of the deceased, other than the interest the plaintiff had under said will. By the assignment the plaintiff divested himself of the interest which would give him a standing to litigate the will in the Probate Court, whose judgment upon the validity of the will as a disposition of personalty, unreversed on appeal, would be a finality, and he also divested himself of the right to contest the will as a demise of lands by action of ejectment. By the agreement of compromise and the execution of it, the plaintiff not only deprived himself of the ability to litigate the probate of the will, but also conferred upon the defendant and his associates an indefeasable title to all the estate, real and personal, of the deceased, which would have come to the plaintiff as one of the heirs at law and next of kin, other than the portion he would take under the will. This assignment of the plaintiff's interest in his father's property would stand, although the will should be set aside at the instance of other persons interested. To this extent the defendant must be regarded as a purchaser of a contingent interest in the estate of the deceased.

But it is insisted that the declaration is defective in that it contains no averment that the portion given to the plaintiff by the will, and which by the agreement he retained, was not equal to the share the plaintiff would have taken in case the deceased had died intestate. *Seaman v. Seaman*, 12 Wend. 381, was relied on to support this contention. In that case it was held that the withdrawal of a *caveat* by an heir at law was a sufficient consideration for a promise by the devisees to pay the heir a specific sum, but that the declaration on the promise must aver that provision was not made for the plaintiff by the will equal to that which he would have

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taken as heir if there had been no will; for without such an averment, as was said by the court, it would not sufficiently appear that the plaintiff was particularly interested in setting aside the will, and without this he could have no interest in contesting it before the surrogate. This decision was followed and applied in *Busby v. Conway*, 8 Md. 55, to the extent of holding that it was a fatal objection to a declaration in such a suit that it failed to allege that the testator left assets, after the payment of debts, in which the plaintiff would have had an interest.

It is conceded that where the transaction is simply between an heir and devisees, and there is no contingency which might affect the *quantum* of the estate to be divided—as the court seems to have regarded the transaction in *Seaman v. Seaman*—a promise to pay an heir at law a sum of money to induce him to withdraw a *caveat*, would be without consideration. Such an arrangement would leave the rights of the parties, after the compromise, just where they were before. No right of the plaintiff would be extinguished or affected by the compromise, and the promise to pay would be without consideration no benefit accruing to the promisor by the arrangement. *Conover v. Stillwell*, 5 Vroom, 54, 59. A declaration disclosing such a transaction would be bad on demurrer. In *Kays v. Dutton*, 7 M. & G. 807, it appeared in the declaration that the plaintiff had no interest in the premises released except a lien for certain moneys he had paid as security for a mortgage debt, and his release of the mortgaged premises expressly reserved to him his lien on the property. The identical interest he had he reserved, and the release amounted to nothing. It appeared on the face of the declaration that the contract of compromise left the parties' rights just as they were before. Hence the promise to pay appearing to be wholly without any consideration, the declaration was adjudged to be bad.

The rule of pleading adopted in *Seaman v. Seaman* cannot be recognized as a general rule applicable to agreements between heirs or next of kin and devisees and legatees, without denying the power of persons interested in estates of decedents to make a compromise of disputes before the final settlement of the estate is effected.

Edwards v. Baugh, 11 M. & W. 641, is the leading case on this subject. The declaration alleged only that certain disputes and controversies were pending between the plaintiff and defendant as

to whether or not the defendant was indebted to the plaintiff in a certain sum; whereupon, in consideration that the plaintiff promised the defendant not to sue him for the sum in dispute, the defendant promised to pay him £100. The court held that this was not a good allegation of consideration, for a man may threaten to bring an action against any stranger he may happen to meet in the street. The court added that the case might have been different if the declaration had said, "whereas the defendant was indebted to the plaintiff in divers sums of money for money lent, etc., and a dispute arose as to the amount of the debt so due; and in order to put an end to all controversies respecting it, it was agreed that the plaintiff, in consideration of receiving £100, should not sue the defendant in respect of his original claim." Lord ABINGER also added that "where an action is pending, forbearing to prosecute it, is a sufficient consideration for a promise to pay a certain sum of money; for besides other advantages, the party promising would save the extra costs which he would have to pay even if he were successful." The principle of this decision is that the declaration did not disclose any subject-matter in relation to which disputes and controversies had arisen which had become a matter of compromise.

In *Smyth v. Holmes*, 10 Jur. 862, a case in some respects similar to *Edwards v. Baugh*, the declaration alleged that certain differences were pending between the plaintiff and defendant which had been referred to arbitration, and that the parties had agreed that on the payment of the sum of \$200 by the defendant the reference should cease. Breach, the nonpayment of the \$200. The declaration was held good. In this case Baron PARKE commented on *Edwards v. Baugh* as distinguished in the fact that in that case there was merely an unexecuted agreement of discharge by the plaintiff, whereas in the case then in hand the parties had abandoned the agreement of reference, by putting an end to which each of them got some immediate advantage. In *Smith v. Monteith*, 13 M. & W. 426, the declaration stated that an action by the plaintiff had been commenced against D.; that D. was arrested and in custody under a *capias* in that action, and that the defendant, in consideration that the plaintiff would discharge D. out of custody, promised to pay the plaintiff a certain sum. It was objected that the declaration contained no allegation that the plaintiff had a good cause of action, or even a doubtful claim, against D. The court sustained the declaration as being *prima facie* sufficient, the former action being pre-

sumed to be for cause, and the *capias* being presumed to have been properly issued.

The compromise of a disputed claim made *bona fide* is a good consideration for a promise, whether the claim be in suit, or litigation has not been actually commenced, even though it should ultimately appear that the claim was wholly unfounded — the detriment to the party consenting to a compromise, arising from the alteration in his position, forms the real consideration which gives validity to the promise. The only elements necessary to a valid agreement of compromise are the reality of the claim made and the *bona fides* of the compromise. *Cook v. Wright*, 1 B. & S. 559, 570; *Callisher v. Bischoffsheim*, L. R., 5 Q. B. 449; *Ockford v. Banelli*, 25 L. J. 504; *Miles v. N. Z., etc., Est. Co.*, 32 Ch. Div. 267, 283, 291, 298.

The court will not inquire into the adequacy or inadequacy of the consideration of a compromise fairly and deliberately made. *Naylor v. Winch*, 1 Sim. & Stu. 555; *Lucy's case*, 4 DeG., M. & G. 356; 1 Story Eq. Jur. 131; 2 Pom. Eq. Jur., § 855.

The declaration alleges a real subject-matter of dispute — the estate of the decedent, in which the plaintiff was interested as an heir at law and next of kin, and the defendant as residuary legatee — a dispute over the testamentary disposition of the estate, and an agreement of compromise wholly executed by the plaintiff, and accepted and in part executed by the defendant. A declaration setting out these facts shows a sufficient consideration for the defendant's promise. An averment that the provision in the will for the plaintiff, which he retained, was not equal to his share of his father's real and personal estate, as heir at law and next of kin, would make an issue on the adequacy of the consideration; and the court will not inquire into the adequacy of the consideration where there is a subject-matter of compromise and the compromise was *bona fide*. If the agreement of compromise was obtained by fraud, the defendant, as in *Smith v. Monteith*, *supra*, must make the defense by plea.

The plaintiff should have judgment on the demurrer.

STATE V. MAYOR AND ALDERMEN OF JERSEY CITY.

(40 N. J. Law., 540.)

Taxation — "railroad purposes" — grain elevator.

A grain elevator erected by a railroad company on its lands and used by it in transshipping grain is exempt from taxation as for railroad and transshipping purposes.*

CERTIORARI to review assessment for taxes. The opinion states the case.

J. B. Vredenburg, for plaintiff.

R. B. Seymour, for defendants.

VAN SYCKEL, J. This *certiorari* is brought to review an assessment for taxes for the years 1881 and 1882 on parts of blocks 78 and 79, in size two hundred and six feet by one hundred and forty-six, in Jersey City.

These lands were conveyed by the State of New Jersey to the United Railroad and Canal Companies by an act of the legislature entitled "An act to enable the United Railroad and Canal Companies to increase their depot and terminal facilities at Jersey City," passed March 30, 1868. Pamph. L. 551.

In this conveyance the lands conveyed, of which the above blocks are part, are "granted to said United Companies, their successors and assigns, to hold in the corporate name of the New Jersey Railroad and Transportation Company, or otherwise," and it is thereby declared "lawful for said grantee to fill up and improve said property and erect thereon wharves, piers, canals, slips, storehouses, depots and other buildings, and shops and cars and engine-houses and appendages, and lay out, construct and build a branch railroad from their main line to said property; and said company and its officers shall have the supervision and control of the wharves, piers, canals, buildings and other improvements which they may erect on the said property, and may charge for such wharfage and other rates for the use thereof as the directors may deem reasonable, or as may be agreed upon with the parties desiring to use the same;

* Compare *Matter of Swigert* (119 Ill. 83), 59 Am. Rep. 70..

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and all acts and parts of acts heretofore passed, which subject such lands, if exceeding a certain quantity, to any other tax than that which is imposed upon said companies, respectively, by their respective charters or acts of incorporation, are hereby repealed; provided however that such parts of said property, and the improvements to be made thereon as shall be used for other than railroad, canal, depot, transshipping or landing purposes (but no other portions thereof) shall be subject to local and municipal taxation.

The consideration paid by the grantees to the State for these lands was \$500,000.

In 1878 the prosecutors built upon the aforesaid block an elevator for the transshipping of grain. The city of Jersey City assessed upon this land for municipal purposes the taxes in question. The relators claim that the property is exempt from this local taxation under the provision of the grant which has been stated. The defendants insist that the use of this portion of the property for an elevator is the use of it for other than railroad, canal, depot, transshipping or landing purposes, and therefore not within the exemption.

It appears in the evidence that the elevator is used for transshipping grain and relieving cars of their lading. The elevator does by machinery what was before done by hand, and appears to be one of the necessary terminal facilities of a railroad, engaged in the transportation of large quantities of grain. It further appears that the grain passing through this elevator, if not called for by the consignee, is retained there, and if it remains in store for over ten days a charge is made of one-quarter of a cent per bushel for each ten days thereafter. Before the elevator was built grain was sometimes detained in the cars, and when so detained a demurrage charge of \$5 or \$10 a day per car, or two cents per bushel, was paid by the consignee. Other trunk lines to the west had erected elevators prior to the erection of the one in question. They are used as freight-houses for grain, and seem to be as indispensable to the railroads in handling the immense quantity of grain which they carry as any other freight-houses used for the reception or unloading of merchandise transported.

If grain was allowed to remain in the elevator until called for, without charge, it would unquestionably be an appliance for railroad purposes. The fact that a small penalty is added to the freight charge to induce shippers to remove their grain within a reasonable time does not withdraw this structure from that class

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of improvements which are necessary for railroad uses, within the meaning of that term as construed in *State v. Hancock*, 35 N. J. L. 537.

A rule far less liberal to railroad corporations has been adopted in Pennsylvania. In *Railroad v. Berks County*, 6 Penn. St. 70, the court say "that it is only such property belonging to corporations, and which is appurtenant and indispensable to its construction and fitting it for use, that can claim exemption from taxation. It is not enough that it is a convenient possession, or that it affords facilities in carrying on the business of the company. It would be convenient and desirable for the company to own warehouses, coal yards, coal-shutes and machine-shops at many points on the road. But these erections and conveniences form no part of the road. They are necessary and indispensable facilities to increase the business of the road, and to enable the company to make profits."

In this case the court exempted from taxation depots, offices, oil houses and water stations, in the view that such structures might fairly be deemed necessary and indispensable to the construction of the road, but imposed the burden on warehouses, coal-shutes, machine shops and wood yards, on the ground that they formed no part of the construction of the road; that they were not appurtenant to the road, but to the business done upon it. *Commissioners of Wayne v. Delaware & Hudson Canal*, 15 Penn. St. 351, is to the like effect.

In *Erie County v. Erie & Western Co.*, 87 Penn. St. 434, the Supreme Court of Pennsylvania re-affirmed the doctrine of the two cases above cited, and held that grain elevators were not exempt from taxation, on the ground that those things only are exempt which enter into the very composition of the works of such corporations, and without which they could not exercise their corporate functions. The distinction between what entered into the construction of a railroad and what is used only as a means for carrying on its business was adhered to.

I am unable to reconcile these cases with the rule of construction adopted by our court of last resort in the case before cited from 6 Vroom.

If however any doubt existed as to the meaning of the words "for railroad purposes," as used in the exemption clause of the act of 1868, it would be removed by reference to the preamble of the act. The preamble recites: "That whereas the United Companies require for the accommodation of their business more room

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for depot, storage and other railroad and canal purposes, at Jersey City." Thus the legislature expressly recognized the appropriation of the land to storage as a use of it for railroad purposes. At the time of the passage of this act the United Companies had constructed their road to Jersey City. It was not for the construction of the road that the grant was made, but it was as expressly set forth, to give greater facilities for the accommodation of the business of the road. Room for depots and room for storage were classed together as necessary railroad uses.

The legislature must be deemed to have used the words "railroad purposes," in the clause exempting from taxation, with the meaning given to them in the preamble to the act.

The land therefore is not deprived of immunity from taxation by the erection of an elevator upon it.

No legislative enactment can, without the assent of the grantees, deprive them of the benefit of the contract which guarantees this exemption from taxation. Nor is there any substantial basis for the contention that the exemption was swept away by the adoption of that amendment to the Constitution which declares that "property shall be assessed for taxes under general laws, and by uniform rules according to its true value."

State v. Newark, 40 N. J. L. 558, holds that no legislation is necessary to enforce this provision; that it went into effect immediately on its adoption, and operated as an abrogation of all special laws for assessing property for taxes. There has been no judicial declaration that a contract like the one in question can be, or has been abrogated or annulled by constitutional amendment.

A State Constitution is a law within the meaning of that clause of the Constitution of the United States which ordains that "no State shall pass any law impairing the obligation of contracts." *Dodge v. Woolsey*, 18 How. 331; *Lehigh Valley R. v. McFarlan*, 31 N. J. Eq. 706, 723.

The effect given to this amendment in the recent railroad tax decisions is not that all property must be taxed, but that all property selected for taxation must be assessed under general laws, and by uniform rules, according to its true value.

Finally, it is insisted that the exempting clause in the second section of the act of 1868 is repugnant to that provision of the Constitution which declares that "every law shall embrace but one object, and that shall be expressed in its title."

 Smith v. Donohue.

The provisions in certain railroad charters for exemption from taxation, or for special modes of taxation, have never, on this ground, been successfully assailed in this State.

There is nothing in the title of any of those charters which expressly indicates that they contain any such peculiar provisions. It has been the practice so generally in railroad charters to make special provisions in respect to taxation, that no one should be surprised at the presence of the exempting clause in the act before us. The title is sufficient, according to the rule laid down in *Walter v. Town of Union*, 33 N. J. L. 350.

But if a defect in the title of the act existed in this respect, the defendant corporation is precluded from taking advantage of it. The act of 1868 cannot be treated as an ordinary act of legislation. It is something more; it is a contract between the State and the United Companies, by which, for a stipulated price, lands are conveyed to the companies upon certain terms and conditions therein specified. The State has accepted the payment of the full consideration from its grantee, and is not now in a position either to repudiate or to permit any of its political subdivisions to repudiate any of the terms of the contract which inure to the benefit of the grantee.

The assessments certified should, in my judgment, be set aside.

On account of engagements in the Circuit, Mr. Justice PARKER took no part in the decision of this case.

Judgment reversed.

 SMITH V. DONOHUE

(49 N. J. Law, 546.)

Animals — dog — scienter — ordinance.

The plaintiff, while walking in a street in front of the defendant's house, on a dark night, was bitten by the defendant's dog lying there unmuzzled. There was an ordinance prohibiting the running of unmuzzled dogs at large in the street. *Held*, that the defendant was not liable without proof of the *scienter*.*

ACTION for injury by a dog bite. The opinion states the case. The defendant had judgment below.

* See note, 36 Am. Rep. 752; *Evans v. McDermott*, ante, 608.

Smith v. Donohue.

J. W. & J. K. Field, for plaintiff.

C. F. Lighthipe, for defendant.

VAN SYCKEL, J. In July, 1885, the plaintiff, while walking in the public street in front of the defendant's premises, was bitten by the defendant's dog, which was lying unmuzzled on the sidewalk. The night being dark, the plaintiff did not see the dog until he sprang upon her and bit her.

It also appears that a city ordinance prohibited the running at large of dogs in the street at any time without a muzzle.

The plaintiff insists that the dog, lying upon the sidewalk in violation of the city ordinance, must be regarded as a nuisance, and that therefore the owner is liable for any injury done by him.

Under the authority of *Durant v. Palmer*, 29 N. J. L. 544, it may be that if the plaintiff, while on her way in the public street, had unavoidably fallen over the dog and injured herself, the owner of the dog would be liable in damages for such injury. But whether he is liable for damage inflicted by the biting of the dog must depend, I think, upon the existence of the necessity of proving the *scienter*. The fact that the defendant acted in breach of the city ordinance subjects him only to the penalty prescribed therefor; it is not a circumstance upon which recovery in this suit can be supported.

The only question in the case is whether this suit will lie without proof that the defendant had knowledge of the vicious propensity of the dog. The rule has generally prevailed in the English courts that if an animal, having no natural propensity to be vicious, commits an injury, the owner is not liable, unless he has knowledge of his disposition.

In *Mason v. Keeling*, 12 Mod. 332, Lord HOLT said that the law takes notice that a dog is not of fierce nature, but rather the contrary, and he therefore sustained the demurrer to the plaintiff's declaration because it did not allege the *scienter*.

In *Beck v. Dyson*, 4 Camp. 198, Lord ELLENBOROUGH directed a nonsuit, because the evidence was not sufficient to warrant the jury in inferring that the defendant knew the dog was accustomed to bite.

In a like case Lord ABINGER nonsuited because it did not appear that the owner had knowledge of the vicious propensity of his dog. *Hogan v. Sharpe*, 7 Car. & P. 755.

In *Buzentine v. Sharp*, 3 Salk. 12, the reporter says: "The plaintiff declared that the defendant kept a bull, which used to run at men, but did not say *sciens* or *scienter*, and this was adjudged ill after a verdict, because the action will not lie unless the owner knew the quality of his bull, and it cannot be intended that this was proved at the trial, because the plaintiff is not bound to prove more than is laid in his declaration."

Cox v. Burbridge, 13 C. B. (N. S.) 430, was a case where the defendant's horse, being on the highway, kicked the plaintiff, a child playing there. There was no evidence to show how the horse came on the highway, or that he was accustomed to kick. The plaintiff obtained a verdict whereupon the defendant was granted a rule *nisi* to enter a nonsuit. Chief Justice EARLE, with whom all the judges agreed, said: "Even if there was no negligence on the part of the owner of the horse, I do not see how that is at all connected with the damage of which the plaintiff complains. It appears that the horse was in the highway, and that without any thing to account for it he struck out and injured the plaintiff. I take the well-known distinction to apply here that the owner of an animal is answerable for any damage done by it, provided it be of such a nature as is likely to arise from such animal, and the owner knows it. Thus in the case of a dog, if he bites a man or worries sheep, and his owner knows he is accustomed to bite men or to worry sheep, the owner is responsible; but the party injured has no remedy unless the *scienter* can be proved. This is very familiar doctrine. The owner of a horse must be taken to know that a horse will stray, if not properly secured, and may find its way into his neighbor's corn or pasture. For a trespass of that kind, the owner is of course responsible. But if a horse does something which his owner has no reason to expect him to do, he has the same sort of protection that the owner of a dog has."

In *Jackson v. Smithson*, 15 M. & W. 563, where a ram butted the plaintiff's wife in the street, the Court of Exchequer refused to hold the owner of the animal liable, in the absence of evidence that he was aware of its propensity to attack passers-by.

In *Hudson v. Roberts*, 6 Exch. 697, POLLOCK, C. B., said that there must be some evidence of *scienter* to sustain an action for injury done by a bull while being driven along the highway.

The case of *Angus v. Radin*, 5 N. J. L. 816; s. c., 8 Am. Dec. 626, holds the owner of cattle to a stricter accountability for damages

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done by them than the English cases establish. In that case, the defendant's oxen broke the plaintiff's close and killed his cow, and the owner of the oxen was held liable, without proving the *scienter*, on the ground that he was responsible for the entire injury committed by his cattle while trespassing upon the plaintiff's premises.

Cox v. Robbins, 9 N. J. L. 384, requires every man, at his peril, to keep his cattle on his own close, and makes him answerable for any injury they may do by straying, without his knowledge, upon the lands of another.

But I have found no case where the owner of a dog has been held in an action of trespass where his dog went upon the premises of another without his consent.

Beckwith v. Shordike, 4 Burr. 2092, was placed upon the express ground that the defendant was himself a trespasser with his dog in the plaintiff's close, at the time the damage was done, so that the jury had a right to find that the act of the dog was the voluntary trespass of the master.

Cooley Torts, 34, draws a distinction between dogs, and beasts which subsist on grass and grain. If the latter break into inclosures, they may do serious mischief, and therefore if not restrained by the owner, he must respond for the damages that ensue.

No action has been maintained in this State against the owner of a dog for killing sheep upon the land of another unless the *scienter* was shown.

Mr. Chitty, in his first volume on Pleadings, page 182, says that the owner of a dog is not liable unless he has notice of his vicious propensity, but if the animal were naturally of the propensity to do the mischief complained of, as horses and cattle to trespass on the land, the owner is liable without alleging the *scienter*.

The forms of pleading in the books of precedents are all in accordance with this text.

The practice has so long and so universally prevailed of permitting dogs to run at large in our streets and highways, without holding the owner liable for any injury which he had no reason to believe they would commit, that it would justly create great surprise to maintain such a cause of action now. In my opinion the action will not lie without proof of the *scienter*. The judgment below should be affirmed.

On account of engagements in the Circuit, Mr. Justice PARKER took no part in the decision of this case.

DORR V. HARKNESS.

(40 N. J. Law, 571.)

Landlord and tenant — tenant's negligence — fire.

A tenant maintained a fire in a leased barn, in a stove, the pipe passing through a hole in the roof, by means whereof the barn was destroyed by fire. *Held*, that a finding that the destruction was by the tenant's fault would not be set aside.

ACTION for rent. The opinion states the case. The plaintiff had judgment at the trial, which was reversed by the common pleas.

James M. Trimble, for prosecutor.

Louis Hood, for defendant.

MAGIE, J. The action in the District Court was brought by Dorr against Harkness to recover rent reserved on a lease of land whereon stood a house, barn and outbuildings.

Harkness admitted that the rent claimed was unpaid, but denied his liability. His defense was based on the provisions of the supplement to the Landlord and Tenant Act, approved March 5, 1874. (Rev. 576, § 28), which enacts that whenever any building or buildings erected on leased premises shall be injured by fire, without the fault of the lessee, the landlord shall repair the same as speedily as possible, or in default thereof the rent shall cease until such time as such building or buildings shall be put in complete repair, etc.

The cause was tried in the District Court, without a jury, and the state of the case sent to the Common Pleas, on appeal, contained the facts found in accordance with the rule laid down in *Benedict v. Howell*, 39 N. J. L. 221.

It thus appeared that the barn and outbuildings on the leased premises had been burned before the rent claimed had accrued, and that the landlord had not made repairs as speedily as possible. It also appeared that the tenant had allowed a servant to maintain a fire in a stove in a room in the barn, having its vent by the stovepipe which ran through a hole in the barn roof. The statement of the case concludes thus: "The court found as facts in this cause that the fire was the result of the use of the stove used in the buildings

by the tenant; that the use of the said stove was without the knowledge of the landlord and without his consent; that the defendant was guilty of negligence in allowing his hired man to put up a stove and build a fire therein; that therefore the destruction of the buildings was not without the fault of the lessee."

The judgment of the District Court was in favor of the landlord, and obviously proceeded on the ground that the statute relied on by the tenant did not apply, because the fire did not occur without his fault.

The rule of the Common Pleas reversing this judgment states "that the court below erred in law * * * in holding that the evidence showed fault of the tenant, this court being of opinion that it does not appear from the evidence that the tenant was guilty of fault within the meaning of the statute."

Since a review by the Common Pleas of such a judgment is restricted to questions of law, it is plain that when this rule speaks of evidence it intends the facts found by the court below and appearing in the state of the case and which are conclusive. Thus read the reversal appears to have rested on one of two propositions, viz., either that negligence of a tenant causing injury to leased buildings by fire is not a fault within the meaning of the statute, or that on the facts found the tenant's conduct could not be legally considered negligent. As either proposition would sustain the reversal, both have been considered.

The first question then is whether a tenant's negligence occasioning a fire which injures the demised buildings is a fault within the meaning of the statute.

The statute deals with the relation between landlord and tenant. When it relieves the tenant from his obligation to his landlord in case of a fire occurring without his fault, it must, in my judgment, be taken to indicate some act or omission of the tenant, which, in view of that relation, is a legal wrong. This leads to a consideration of the liability of a tenant to a landlord for injuries by fire to the demised building by reason of the tenant's negligence.

At common law, he in whose house or chamber a fire originated, whether by negligence or mere accident, was responsible for injuries occasioned by its spread to other premises. Lord Chancellor LYNTHURST, in reviewing the ancient authorities for that doctrine, declared it to be a "peculiarity in the common law" founded

on the general custom of the realm. *Viscount Canterbury v. Attorney-General*, 1 Phil. 306. A majority of the judges of the King's Bench held that the doctrine extended to fires kindled in an owner's close. *Tuberville v. Stamp*, 1 Salk. 13.

The liability imposed by the common law was afterward restricted by legislation. Such restriction was furnished, first, by statute 6 Anne, chap. 31, which exonerated from such liability any person in whose house or chamber any fire shall "accidentally begin," and second by statute 14 Geo. III, chap. 78, which extended the exoneration to any person "on whose estate" any fire shall "accidentally begin."

By the provisions of the common law and the statutes of Marlbridge and Gloucester, tenants were liable to the landlord for waste of the demised premises. *Moore v. Townshend*, 33 N. J. L. 284. This liability was said to extend to cases where demised buildings were burned, either by negligence or mischance. Co. Lit. 536. It seems plain that this liability was intended to be restricted by statute 6 Anne, chap. 31, for the sixth section, which contained the restrictive clauses, was followed by a proviso in the seventh section that nothing therein contained should defeat or make void any agreement between landlord and tenant.

The course of our legislation on the subject is instructive. The statute 14 Geo. III, chap. 78, has never been re-enacted in this State. The statute 6 Anne, chap. 31, was entitled "An act for the better preventing mischiefs that may happen by fire." The main part of the statute was directed at preparations for preventing or extinguishing fires. One section imposed a punishment on servants who fired any house by negligence or carelessness. The section which restricted the ancient liability for injuries occasioned by the spread of a fire originating in any house, enacted its restrictions, "any law, usage or custom to the contrary notwithstanding." This statute, as a whole, has never been here re-enacted, but the sixth section, with the proviso contained in the seventh section, was early adopted in our legislation and became part of the "Act for the prevention of waste." It now forms the eighth section of that act. Rev. 1235. It is not insignificant that the re-enactment omitted the words "any law, usage or custom to the contrary notwithstanding," contained in the original act.

It may be well argued thereon that the peculiar liability which by the general custom of the realm of England was imposed on

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every one for injuries resulting from fire originating in his house or close was never admitted to be applicable to the people of this colony and State, for otherwise it would seem that the provisions restricting that liability would have been made to apply, when reenacted here, to all circumstances and relations. But in fact it was inserted in the Waste Act, and so appears limited in its application to the relation of landlord and tenant. In this view the general liability for injuries resulting from fire originating in one's house or close would depend on general principles and not on a peculiarity of the common law arising out of a general custom of the mother country. But no opinion need be or is intended to be expressed on the nature or extent of the general liability.

What concerns us in the case in hand is only the liability of a tenant to his landlord for waste of the demised premises when occasioned by fire. The adoption of section 6, statute 6 Anne, chap. 31, into our Waste Act clearly indicates that the tenant's liability was previously broader than was thought fit, and it was thereby restricted and the tenant exempted from liability whenever the fire accidentally began. It becomes necessary to construe this language, which it will be observed is precisely that of the English statute above referred to.

What was termed by Lord DENMAN "a singular doubt," arose on the construction of those statutes. It arose because of an opinion expressed by Sir William Blackstone in his Commentaries. His statement was, in substance, that the common law, which would have rendered a master liable for the negligence of his servant in keeping his fire, had been altered by the statute which ordained that no action should be maintained against any in whose house or chamber any fire should accidentally begin, for (he adds) "their own loss is sufficient punishment for their own or their servants' carelessness." 1 Bl. Com. 431.

Lord LYNTHURST, in the case above cited, commented on this construction and called attention to the fact that the Court of Common Pleas had sanctioned a recovery for injury done by a fire kindled in a field and escaping by a servant's negligence, although the statute 14 Geo. III, chap. 78, if construed as Blackstone had construed statute 6 Anne, chap. 31, would have been a complete defense. *Vaughan v. Menlove*, 3 Bing. (N. C.) 468. It did not become necessary for Lord LYNTHURST to construe either statute, but it is plain he doubted the accuracy of the construction of the commentator.

The same question was afterward discussed in the Court of Queen's Bench on a motion to arrest judgment. The declaration which was objected to contained a count based on the making and keeping a fire in defendant's close so negligently that by the negligent conduct of defendant and his servants it escaped to plaintiff's close and injured him. The statute 14 Geo. III, chap. 78, was applicable if construed as Blackstone had construed the previous statute. Lord DENMAN, Justices COLEBRIDGE and WIGHTMAN assenting, expressed the opinion of the court in favor of the declaration. He carefully reviewed the rule of the common law and the alterations effected by these statutes, and the decision settled that the fire produced by negligence was not "accidentally" begun within their meaning, and the exoneration from liability did not extend to a fire occasioned by negligence. *Philliter v. Phippard*, 11 A. & E. (N. S.) 346. I do not find that the question has been again raised in England. The construction given in the case last cited was approved in *Webb v. R., W. & O. R.*, 49 N. Y. 420; s. c., 10 Am. Rep. 389. I have not been referred to nor have I discovered other cases in this country.

The construction thus given to the words "accidentally begun" in the English statutes must, in my judgment, be given to the same words in our statute. The latter affects the relation of landlord and tenant only. The evil it designed to remedy was an excessive and unjust liability for waste of demised premises by fire, however originating. To remedy this evil, it was sufficient to exonerate the tenant from liability for all fires occurring without some act or omission on his part, which in view of his relation to his landlord was culpable. The words in question, literally construed, may not relieve the tenant so far, but they will bear such a construction, and it will carry out the intent of the legislation. For these reasons I think that a fire, occurring by the negligence of a tenant, and wasting the demised premises, is not a fire accidentally begun, within the meaning of section 8 of the Waste Act. Such negligence is therefore a wrong, and constitutes a fault, within the meaning of the supplement to the Landlord and Tenant Act in question in this case.

It remains to consider whether the judgment holding the tenant negligent could be reversed as erroneous in law.

Whether negligence exists is a mixed question of law and fact. *Shearm. & Redf. Neg.*, § 11; *Durant v. Palmer*, 29 N. J. L. 544.

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Such questions are to be determined by a jury, under the direction of the court, on consideration of all the circumstances found. *Earle v. Earle*, Spencer, 347; *Wood v. Hurd*, 34 N. J. L. 87. If the facts are found, the only question on *certiorari* is whether there was any mistake or misapplication of the law. *Brown v. Ramsey*, 29 N. J. L. 117. The facts having been conclusively determined in this case, the only question is whether the finding of negligence thereon was a mistake in law.

Negligence, in such case, must be held to exist when there is shown an absence of such care for the safety of the demised premises as a man in the exercise of reasonable prudence would take. Looking at the facts found, I cannot say that this proposition was not that on which the District Court found the tenant to be negligent. Upon the application of that proposition to the facts, negligence might be inferred. The Common Pleas therefore erred in reversing, if their reversal was on this ground.

The judgment of the Common Pleas must therefore be reversed, with costs.

On account of engagements at Circuit, Mr. Justice PARKER took no part in the decision of this case.

METROPOLITAN LIFE INSURANCE CO. v. McTAGUE.

(49 N. J. Law, 587.)

Insurance — revival — warranty — "disease."

Where a revival of a forfeited life insurance policy is assented to, the original contract is reinstated with all its terms and the new terms expressed in the application for revival.

A cold is not a "disease," but a representation that the insured had not consulted or been prescribed for by a physician is falsified by proof of a consultation or prescription for a cold. (*See note, p. 665.*)

ACTION on a life insurance policy. The opinion states the case. The plaintiff prevailed below.

Jos. A. Beecher, for prosecutor.

Frank E. Bradner, for defendant.

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MAGIE, J. The action in the District Court was founded on a policy of life insurance, dated April 14, 1884, whereby the Metropolitan Life Insurance Company agreed, if certain premiums were paid, to pay to Annie McTague a certain sum on the death of John McTague, her husband.

The judgment of the District Court was in favor of Annie McTague, and it was affirmed on appeal.

It appears by the state of the case that the policy in question originally issued upon the application of Annie McTague. It was averred in the policy that the contract was made in consideration of the representations contained in the application, which was therein "referred to, and made part of this contract." The policy further stipulated that if the representations were not true, the contract should be void.

By force of these stipulations the application and the representations thereby made were incorporated into the completed contract of insurance, and the truth of the representations was warranted. If false, although in immaterial particulars, the contract would be avoided. *Dewees v. Manhattan Ins. Co.*, 34 N. J. L. 244; *Carson v. Jersey City Ins. Co.*, 43 N. J. L. 300; s. c., 39 Am. Rep. 584; s. c., 44 N. J. L. 210; *Cushman v. United States Life Ins. Co.*, 63 N. Y. 404; *Phoenix Mut. Life Ins. Co. v. Raddin*, 120 U. S. 183; *McDonald v. Law Union Ins. Co.*, L. R., 9 Q. B. 328.

The contract thus made became forfeited by the failure to pay the weekly premiums as agreed. Afterward, and on February 12, 1885, Annie McTague signed and delivered to the company a written application called a "revival application." It described the forfeited policy, admitted that the weekly premiums had remained unpaid for thirty-one weeks, and contained the following, viz.: "The undersigned assured hereby declares and warrants that the life heretofore insured under the above named policy has not, since said policy was issued, been sick or afflicted with any disease, or met with any accident, or consulted or been prescribed for by any physician, and that the habits of said insured are sober and temperate. Said policy having lapsed, the undersigned desires to renew the same, and herewith pays the premiums in arrears, with the understanding that no liability exists on the part of the company, until said company, at its home office in New York city, shall have assented to the revival of said policy, and so notified its agent first above named; nor shall said policy be deemed to be in force

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unless, upon the date of its revival by the company, at its home office as aforesaid, the said insured shall be alive, and in sound health. It is further warranted that the statements in this and the original application are in all respects true, otherwise the insurance will be void, and all payments made will be forfeited to the company." The company assented to the revival of the policy by an approval of the revival application annexed thereto, and signed by one of its officers. It notified the agent referred to, and received the premiums in arrears, and those which subsequently fell due up to the death of John McTague, which occurred September 9, 1885.

It now disputes the liability upon the policy on the ground that statements contained in the revival application were untrue. The question thus raised requires us to determine what contract existed between the parties after the policy was revived and the relation to that contract of the revival application and its representations.

The forfeiture of such a policy by non-payment of premiums may be waived, and such waiver will generally be inferred from a receipt of the premiums after forfeiture. Upon such a waiver the pre-existing contract doubtless becomes reinstated upon its original terms. Such a forfeited policy may also be expressly revived, and in such case the revival may be upon such terms and conditions as the parties agree to. When an express revival is made upon the statements of the original application, it has been made a question whether the truth of those statements is to be tried by the circumstances existing at the time of the original application or at the time of the revival. *Bliss Life Ins.*, § 194. Mr. May says that the authorities do not agree, some taking the view that a renewal makes a new contract, and others that it merely continues the old one. He expresses his opinion that special circumstances seem to control the decision according as they indicate the intent of the parties. *May Ins.*, § 190.

In a like manner the parties may doubtless agree to revive the lapsed contract upon new terms and conditions, or upon its original terms and conditions with such additional terms as they mutually agree to incorporate therewith. Whether the parties merely reinstate the old and forfeited policy, or create a new contract on new terms, or revive the lapsed contract with additional terms, must be determined from the circumstances. In the case before us it is clear, in my judgment, that the intent of the parties was to revive

the forfeited policy with all its original terms by a new contract which incorporated into it additional terms. This appears from the circumstances. The original policy was based on a written application containing statements as to the insurability of the person whose life was to be insured. These statements were expressly incorporated into the contract and warranted to be true. When forfeiture had occurred, the beneficiary in the lapsed contract applied in writing for its revival. The application contained statements as to the insurability of the person whose life was insured, covering the period between the issuing of the original policy and the date of the revival application. It further contained an agreement that the company's liability should only re-arise upon its assent to the application. It contained an express warranty of the truth of the representations then made, and an agreement that if they or the representations of the original application were not true, the contract should be void. This written application was assented to by the written approval of the company, and thereby a new contract between the parties was made, reviving the old policy with all its terms, and incorporating into it the additional terms expressed in the revival application. By these means the representations contained in the revival application became part of the completed contract between the parties, and their truth was warranted. The falsity of any of them will avoid the contract.

Two representations in the revival application are alleged to have been false. The first was that which averred that John McTague had not, since the policy was issued, been "sick or afflicted with any disease." The District Court found as a fact that he had, during that period, had "a cold." The Common Pleas held that the statement of the application was not thereby shown to be untrue. In this I think there was no error. There was nothing in the mere fact found that required the inference that the insured life had been "afflicted by disease" or even "sick." The terms are not to be construed as importing an absolute freedom from any bodily ailment, but rather of freedom from such ailments as would ordinarily be called disease or sickness. Where a lapsed policy was renewed on condition that the insured was in good health, it was held that the phrase was not to be construed as meaning an absolute exemption from any physical ill; and as the policy had issued on an application showing the then state of health of the insured, it was further held that the condition was satisfied by the insured being in a state of

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health relatively like that represented in the original application. *Peacock v. New York Life Ins. Co.*, 20 N. Y. 293. See also *Cushman v. United States Life Ins. Co.*, 70 N. Y. 77. Whether this view be approved or not, I am of opinion that in the absence of proof that the "cold" referred to produced disease or sickness, the courts below rightly held that the falsity of the statement in question was not shown. Nor do I think that the fact, that the insured had been prescribed for by a physician, necessarily required the inference that the cold produced either disease or sickness.

The other statement alleged to be proved false is that which averred that John McTague had not, within the period between the issuing of the policy and the date of the revival application, "consulted or been prescribed for by a physician." The fact found by the District Court was that a physician had been called on by John McTague, or had visited him, and had prescribed for him, for the "cold." The Common Pleas, in their opinion before us, declare that this fact did not show the representation to have been false, because it did not appear what sort of a prescription the doctor gave, whether one compounded by a druggist or made up of some common remedy. But it is obvious that this circumstance cannot be of the least importance in determining the truth or falsity of the representation in question. That representation did not aver a condition of health, or that it was requisite or proper to consult a physician. It averred that he had not consulted a physician or been prescribed for by a physician. The fact found contradicted this averment, whether the consultation and prescription related to a real disease or an apprehension of disease. Indeed, so material does such a representation seem to be to the contract proposed by the application that in my judgment, if made falsely and knowingly, it would avoid the contract. But the materiality of the representation in this case is not in question, for as we have seen, its truth is warranted. Its falsity appears from the fact found.

The result is that the contract was avoided, and the court below erred in rendering judgment thereon. The judgment must be reversed.

Owing to his engagements in Circuit, Justice PARKER took no part in this decision.

NOTE BY THE REPORTER.—In *Cushman v. U. S. Life Ins. Co.*, 70 N. Y. 73, it was held that a temporary ailment cannot be considered a "disease," unless it is such as indicates a vice in the constitution, or so serious as to have some

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bearing upon general health and the continuance of life, or such as according to common understanding would be so called. So where the insured warranted that he had not had "disease of the liver," it was held that proof that he had had slight and temporary attacks of congestion of the liver did not establish a breach of the warranty as matter of law, but the question was for the jury. But insanity is "sickness." *Burton v. Eyden*, L. R., 8 Q. B. 295. Pregnancy may be a source of such "illness" as to render the pregnant person unable to travel as a witness. Whether sunstroke is a "disease of the brain," is a question of fact. *Ins. Co. v. Trapp*, 104 U. S. 197.

 BUCHANON V. ADAMS.

(40 N. J. Law, 626.)

Negotiable instrument — evidence to show how payment was to be made.

In an action on a promissory note, between the original parties, evidence is competent to show that at the time of its execution it was agreed that it might be paid in merchandise, and that it was so paid.*

ERROR to the Supreme Court. Action on a promissory note. The opinion states the case. The defendant had judgment below.

James Steen, for plaintiffs in error.

Isaac W. Carmichael, for defendant in error.

The CHANCELLOR. The plaintiffs in error were the owners of timber land in Burlington county, in this State. In 1881, through their agent, John Buckingham, they caused the land to be laid out in parcels, and the timber standing on the several parcels to be sold. The defendant, Caleb L. Adams, purchased some twenty of these parcels of timber, and gave his promissory note for \$733.50, the price at which he purchased, payable to the order of one Samuel H. Chambers, who was the auctioneer at the sale. Chambers indorsed the note, "without recourse," and delivered it to Buckingham, who in turn delivered it to his principals, the plaintiffs. At the sale, Buckingham agreed with the defendant that payment for the timber the defendant should buy would be accepted in the lumber that should be cut from it, and at the time the note was given further agreed that the note should not be negotiated. After the defend-

*See *Brady v. Henry*, ante, 548.

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ant had delivered to Buckingham more than sufficient lumber to pay the note, suit upon the note was commenced against him.

The errors assigned are based upon alleged mistakes in the admission of evidence at the trial. The only assignment that is sufficiently supported by exception is that which charges that the trial justice admitted parol testimony to vary the terms of the note sued upon.

The testimony objected to was to the effect that Buckingham, contemporaneously with the giving of the note, agreed with the defendant that lumber would be taken in payment of it, and that the note would not be negotiated. This testimony, supplemented by proof that such agreement was executed, on the part of the defendants, by the delivery of more than sufficient lumber to pay the note, was admitted for the purpose of showing that the lumber was in fact received in payment and satisfaction of the note, and not for the purpose of varying the terms of the written promise to pay.

The rule is well settled that evidence of contemporaneous declarations is inadmissible to vary the terms of a written contract. *Meyer v. Beardley*, 30 N. J. L. 236, *Wright v. Remington*, 41 N. J. L. 48; s. c. (affirmed on appeal), 43 N. J. L. 451; *Johnson v. Ramsey*, 43 N. J. L. 279; *Stiles v. Vandewater*, 48 N. J. L. 67.

To this rule the trial justice, in his charge, distinctly called the attention of the jury as he explained the proper use to which the testimony objected to was to be put.

There is no error manifest in the record of the court below, and the judgment must be affirmed, with costs.

For affirmance—The CHANCELLOR, DEPUTY, C. J., PARKER, REED, VAN SYCKEL, BROWN, CLEMENT, COLE, MCGREGOR, WHITAKER, JJ. 11.

For reversal—None.

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ELY v. WILBUR.

(49 N. J. Law, 685.)

Physician — negligence — recovery for services.

A physician may recover for his services, although he was mistaken in his treatment, provided he was not negligent or unskillful. (*See note, p. 671.*)

ACTION for a physician's services. Error to the Circuit Court. The opinion states the point. The plaintiff had judgment below.

Mercer Beasley, Jr., for plaintiff in error.

A. G. Richey, for defendant in error.

KNAPP, J. The action was brought to recover reasonable compensation for services as a physician, rendered by the plaintiff to the defendant, at his request.

By the bill of exceptions, returned with the record, it is shown that the plaintiff was a practicing physician, and that he had bestowed upon the defendant, personally professional medical treatment. The defendant offered evidence tending to show that the plaintiff had mistaken the nature of the defendant's disease, and had in treating him prescribed and administered remedies for a disease which he had not. In the charge to the jury on this phase of the case the chief justice instructed them that this insistent of the defendant, even if true, would not prevent a recovery; that the question was whether the plaintiff exercised proper care and skill as a physician; that if the jury should conclude that the doctor was mistaken in the nature of the defendant's disease, they must go still further, and say that a want of care and skill was exhibited. If no want of care or skill appeared, he was entitled to a fair compensation, although he fell into a mistake.

This charge and instruction to the jury is complained of as error. But it does not seem to us to be subject to any adverse criticism. It is entirely in accord with the general rule, as given by all the approved text-writers on the subject, and but asserts the principle often declared by courts of recognized authority. Chitty Cont. 808, and cases cited in notes.

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The rule is general that whenever labor and services are performed at the request of another there is an implied promise raised by the law to pay for such work and services what they are worth; and the skill and care required in doing the work in order to deserve compensation is that ordinarily possessed and exercised by others in like callings. *Chitty Cont.* 796.

The physician, like the attorney, undertakes in the practice of his profession that he is possessed of that degree of knowledge and skill therein which usually pertains to the other members of his profession. And the physician, in attending his patients, engages that he will use due care to discover the nature of the disease which gives occasion for his services, and in applying the usual remedies. But beyond this measure of skill and diligence the law makes no exaction. If he is to be held for results, or as a guarantor of success, it can be only in virtue of his express engagement. *Smith v. Hyde*, 19 Vt. 54.

Ordronaux, in his "Jurisprudence of Medicine," states the rule in question clearly: "The physician," he says, "is not a guarantor, without express contract, of the good effects of his treatment, and he only undertakes to do what can ordinarily be done under similar circumstances. If the good effect of his treatment and the consequent value of his services be disputed, he must be prepared to show that his labor was performed with ordinary skill and in the ordinary way of his profession. This is all the essential evidence upon which to found his case." *Ord. Jur. Med.* 42.

A further citation from the same author is in point: "If a physician ignorantly and unskillfully administer improper medicine, and the patient consequently derives no benefit from his attendance, the physician is not entitled to any remuneration for what he has done. But if he has employed the ordinary degree of skill of his profession, and has applied remedies fitted to the complaint, he is entitled to his hire and reward, although they may have failed in the particular instance." *Ord. Jur. Med.* 43.

In *Huys v. Phelps*, 2 Stark. 430, Chief Justice ABBOTT, in summing up to the jury, stated the ground upon which a recovery could be had for a physician, as follows: "In case of a regular practitioner, who had used due care and diligence, his claim to remuneration depends not on the question whether he effected a cure; he would be entitled to be paid for his services although he was unsuccessful." See further on this general subject, *McClallen v.*

Adams, 19 Pick. 333; s. c., 31 Am. Dec., 140; *Stater v. Baker*, 2 Wils. 359; *Leighton v. Sargent*, 27 N. H. 469; 31 N. H. 119; *Galagher v. Thompson*, Wright (Ohio), 466; *Scare v. Prentice*, 8 East, 348; *McCandless v. McWha*, 22 Penn. St. 261.

It plainly appears then that the right of a physician to be compensated for his services and medicine does not depend upon the measure of his success in effecting a cure by the means employed, but upon the diligent exercise, under his employment, of the skill which commonly pertains to his profession. Such services cannot be regarded as other than beneficial. They are so in a legal sense, and the right to adequate compensation arises upon their rendition, wherever his fees are otherwise recoverable by suit at law.

But it is said that this case is not within the rule. For conceding that failure in results of usual treatment does not disprove beneficial services, the patient is not treated for his disease. It is argued that if the disease of the patient be mistaken by the doctor, and his treatment be directed under that error, the services could not be meritorious or of value to the patient.

It is to be observed that the bill of exceptions coming with this record gives us none of the evidence taken at the trial, and its statement on argument is entirely aside from the purposes which the writ of error is brought to serve. The bill states only that the suit was for a physician's bill, and the defendant gave evidence tending to show that the plaintiff had mistaken his disease, and treated him for another disease; that the trial judge instructed the jury that in itself this was an immaterial fact. Its value in the case, in connection with the consideration of skill and care, was stated in a subsequent part of the charge, and was not excepted to.

The plaintiff in error claims the fact of such mistake to be both material and controlling in the case. But it can be so only upon the establishment of a proposition which I think has not before been asserted. Directly stated, it is that if after the exercise of due care and skill to discover the nature of his patient's disease, however obscure it may be, the physician errs in judgment, and determines inaccurately, and treats for the disease which to him appears to be that which afflicts his patient, a right to compensation never arises or is forfeited.

The position, if correct, holds the physician to the duties and obligations of a guarantor in diagnosis. Ordinary skill and care will not suffice; indeed the highest skill and diligence to which the

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best ever attain will not fill the measure of duty and requirement, but there must in this branch of the science of medicine be absolute certainty in its results, or no merit attaches to the services.

No case asserts the doctrine that such an assumption is implied on his part in virtue of his professional employment. In legal theory it could only be so on the ground that an error in that branch of the medical art imports the absence of usual skill or care in every case.

It cannot be maintained without direct hostility to the general rule, unless it be true that this branch of medicine is always capable of assured and exact determination in practice, and that the practitioner of customary skill cannot with proper diligence fail to distinguish the nature of each disease. There is nothing before us to show, by admission or proof, that such is the fact. We cannot on any ground known to us so conjecture.

We are better justified in the inference that cases present themselves to the pathologist, where the aid of the most consummate skill of the practitioner is required in determining the true cause to which to refer observed symptoms, with ground still left for possible error.

There would seem to be no reason, and there is no authority for holding that in the mistakes which the careful and skillful medical practitioner may make in judging upon the true interpretation of symptoms, there is to be found a more serviceable defense to a suit for compensation than can be found in mistakes and failures in the results of treatment.

In all that pertains to the practice of the profession, the physician is subject to the one rule, and that rule was correctly stated in the instructions given to the jury on the trial.

This being the only point presented by the bill of exceptions, it follows that the judgment must be affirmed, with costs.

For affirmance—The CHANCELLOR, DEPUE, DIXON, KNAPP, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, MCGREGOR, WHITAKER. 11.

For reversal—PATERSON. 1.

NOTE BY THE REPORTER.—PATERSON, J., dissenting, said, among other things: "In the aspect of the case, as viewed by me, the other errors assigned may be considered under the instruction that it is absurd to say a doctor is not entitled to pay after exercising proper care and skill. To this I cannot subscribe. How can a professional man be declared to have exercised proper skill

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when he makes a serious mistake in the treatment of a disease? Can it be said that a physician maintains, much less increases his reputation for skill, when he commits an error in judgment, whatever may be his intention? A mistake implies a want of skill, and there can be no proper skill where one is made, even where the symptoms are obscure. There is a risk in all the business of life, and this is one to which a medical practitioner is liable, and must assume. Here is a bill, arising from an error of some kind on the part of the plaintiff, and I fail to see how he can be entitled to any remuneration for the exercise of a proper skill under the circumstances of this case. Besides, if as Mr. Ely insisted, the real disease under which he suffered was aggravated by the mistaken treatment, there could have been no service of a beneficial nature, and that would preclude any recovery of compensation. Did he exercise proper care in the management of the case? Care, as I understand, is an expression of less import in medical phraseology; but in the higher signification of the word, is akin to skill. Ordinary care, such as regular attention, good nursing, and to a certain extent the application of remedies, though under medical direction, are expenses additional to the regular charges of the physician. In this view care and skill are included in the claim in the case, and what affects the right to recover remuneration for one, affects equally the other. If forming what doctors call a diagnosis be an element of care, then the line of distinction between the two is not very perceptible, for both certainly belong to the higher branch of medical science. No imputation is intended to be cast upon the plaintiff for having been negligent or careless in the ordinary acceptance of the latter word. But having made a mistake, or what is the same thing, the care and skill he exercised having failed to detect the symptoms of the disease, and by reason thereof his attendance continuing for a longer time than would have been required under a correct diagnosis, the jury should have been instructed to have taken that fact into consideration. It does seem to me, as I read the record, that the plaintiff should have suffered total loss of remuneration rather than the defendant should have been mulcted in the amount of the verdict."

CASES
IN THE
COURT OF APPEALS
OF
INDIANA.

PEARCY V. MICHIGAN MUTUAL LIFE INSURANCE CO.

(111 Ind. 59.)

New trial — juror — misconduct.

In an action against a life insurance company, one of the jurors was preliminarily asked if he held any policy issued by the defendant, and answered no, although the defendant had issued one to him on his life for the benefit of his wife. The plaintiff was ignorant of this fact. *Held*, that he was entitled to a new trial, notwithstanding the juror's affidavit that he was influenced solely by the law and evidence.

ACTION on a policy of life insurance. The opinion states the case. The defendant had judgment below.

E. P. Hammond and *W. T. McNeil*, for appellant.

W. S. Hartman and *W. H. Hamelle*, for appellee.

ELLIOTT, C. J. The appellant's complaint is based on a policy of insurance issued by the appellee on the life of John Percy, the husband of the appellant.

The appellant asks a new trial for the reason, among others, that Ezra Bowman, one of the members of the jury, was incompetent, and because he was guilty of misconduct. In the affidavits filed by the appellant it is stated that each of the jurors was asked "whether he or any of his family held any life insurance policy issued by the

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defendant," and that each of the jurors answered that neither he nor any of his family held a policy. The affidavits filed by the appellee state that the question asked each of the jurors was: "Do any of you hold a policy of life insurance issued by the defendant, the Michigan Mutual Life Insurance Company?" and that the jurors were not asked: "Do you, or any member of your family, hold such a policy." It was further shown that Ezra Bowman had taken out a policy on his life for the benefit of his wife, that the policy was in force at the time of the trial, and that the fact that such a policy was issued was unknown to the plaintiff and her attorneys until after the trial. In the affidavit filed by Bowman he states that the question asked was: "Do you hold a policy of life insurance issued by the Michigan Mutual Insurance Company?" but he does not deny that he had taken out a policy for the benefit of his wife. He and the other jurors swear, that in rendering their verdict, they were influenced solely by the law and the evidence.

It is of high importance to a litigant that the triers of his cause should be impartial and disinterested men, and the law makes careful provision for securing him this right. In speaking of this right the Court of Appeals of New York said: "The object of the law is to procure impartial, unbiased persons for jurors. They must be *omni exceptione majores*. They must have no interest in the subject-matter of the litigation." *Diveny v. City of Elmira*, 51 N. Y. 506. The Supreme Court of Nebraska declared a like doctrine in *Ensign v. Harney*, 15 Neb. 330; s. c., 48 Am. Rep. 344, where it was said: "Unless fair-minded, unbiased jurors can be selected, a trial becomes a mere farce, dependent not upon the merits of the case, but upon extraneous circumstances, such as the bias, prejudice, or interest of the jury. To determine the competency of a juror, an oath is administered to him and he is required to answer all questions touching his qualifications as a juror, not generally, but in that particular case. Great latitude is allowed in such an examination, and if it appears probable that the juror is not indifferent between the parties, he is excluded."

Other courts have asserted a similar doctrine; thus in *Bradbury v. Cony*, 62 Me. 223; s. c., 16 Am. Rep. 449, the court said: "In the trial of a cause, the appearance of evil should be as much avoided as evil itself. It is important that jurymen should be devoid of prejudice. It is hardly less so, that they should be free from the suspicions of prejudice."

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So in *Melson v. Dickson*, 63 Ga. 682; s. c., 36 Am. Rep. 128, it was said: "A big part of the battle is the selection of the jury, and an impartial jury is the corner-stone of the fairness of trial by jury."

The principle is so plain and just that it needs little more than a bare statement, and we refrain from further reference to authorities although they are very abundant.

The examination of a juror on his *voir dire* has a two-fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know the relation sustained by a person called as a juror to his adversary, in order that he may interpose a challenge for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter, since full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance the appellant had a right to a full and truthful answer from Bowman, and it was his duty to make that answer without evasion, equivocation or concealment.

We think that the question asked the juror required him to answer as to the policy taken out on his life for the benefit of his wife. This is our conclusion upon the assumption that the question was that which the appellee maintains it was. It was not incumbent upon the appellee to minutely cover by a long series of specific questions all phases of the subject, but it was enough to ask such a question as would indicate to the mind of a fair and reasonable man what information the examining counsel sought to elicit. It seems clear that such a question as that asked Bowman ought to have drawn from him the fact that he had taken out a policy on his own life for the benefit of his wife, for the question certainly indicated that information as to his interest in the company, as well as his connection with it, was sought by the counsel conducting the examination.

The authorities support our conclusion that if the general question fairly arouses the juror's attention and directs it to the informa-

tion desired, it is enough without specific questions covering minute phases of the subject.

In *Rice v. State*, 16 Ind. 298, the juror was asked as to whether he had formed an opinion, and he answered that he had not, but no inquiry was made as to whether he had served on the grand jury which found the indictment, and yet it was held, on proof that he had been a member of the grand jury, that the accused was entitled to a new trial. The general question here under discussion was well and elaborately discussed in the case of *Block v. State*, 100 Ind. 357. In that case no inquiry was made as to whether any of the jurors was a deputy of the prosecuting attorney, and yet a new trial was ordered on its being shown that one of the jurors was the prosecutor's deputy.

In *Lamphier v. State*, 70 Ind. 317, a juror was asked generally as to whether he was a freeholder or householder, and by reason of an erroneous opinion, he gave an incorrect answer, yet it was held that the accused was entitled to a new trial.

It is true that in exact technical strictness the policy belongs to the beneficiary. *Wilburn v. Witburn*, 83 Ind. 55; *Pence v. Makepeace*, 65 Ind. 345. But in the examination of jurors it is not essential that counsel should employ terms with strict accuracy, for all that need be done is to fairly call the juror's attention to the subject on which information is sought, and indicate to him with reasonable certainty and clearness the purpose of the question. It is common for one who has his life insured for the benefit of his wife or family to regard himself as holding the policy. Nothing indeed is more common than for one who has insured his life for the benefit of his family to speak of himself as having the policy, and very few men if asked the question if they had a policy in a designated company, would think of giving any other answer than that they did have such a policy, even though the policy was payable to some one else. In a broad sense, a man whose life is insured has a policy, although the beneficial interest in it may be in another person, for the policy which expresses the contract is on his life, and he it is that the company insures. We regard it as quite clear that the question asked Bowman required him to answer as to a policy taken out on his own life, although that policy was for the benefit of his wife.

The statement of Bowman, that he was influenced solely by the law and the evidence, does not remedy the wrong. A juror who

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has deceived or misled the court, or the counsel, by a false or incorrect answer, cannot, by a subsequent statement, repair the legal injury caused by his conduct on his preliminary examination. *Hudspeth v. Herston*, 64 Ind. 133; *Lamphier v. State*, *supra*; *Block v. State*, *supra*; *Territory v. Kennedy*, 3 Mont. 520; *United States v. Upham*, 2 Mont. 170.

There are many cases in which the social and business relations between the juror and a party will sustain a challenge for cause, and the authorities go very far toward establishing a rule which would make an interest such as that held by Bowman a cause for rejecting the juror. *Davis v. Allen*, 11 Pick. 466; s. c., 22 Am. Dec. 386; Thom. & Merr. Juries, § 179; Proff. Jury Trials, § 177. But we need not and do not decide whether the interest of Bowman was such as would have warranted a challenge for cause, for it is enough for the present to decide that the information sought by the question was relevant and material for the purpose of enabling the appellant to intelligently exercise her right to interpose a peremptory challenge.

We have not discussed the questions sought to be presented on the pleadings, for the reason that the record is so confused as not to present them properly, and for the additional reason that some of these questions are rendered immaterial by the answers to interrogatories returned by the jury.

Judgment reversed.

POST V. LOSEY.

(111 Ind. 75.)

Surety — extension of time — bankruptcy of debtor.

A wife joined her husband in a note, and mortgaged her separate property as security. The husband subsequently was discharged in bankruptcy. After that, the creditor, knowing all the facts, agreed to extend the time of payment for a definite period and to reduce the rate of interest, and the husband in consideration thereof promised to pay the debt. This agreement was indorsed on the note. The wife did not know of it. *Held*, that she was released.

ACTION on a note. The opinion states the facts. The defendant had judgment below.

S. Claypool and W. A. Ketcham, for appellant.

C. Byfield and L. Howland, for appellees.

ZOLLARS, C. J. On the 2d day of September, 1875, Robert C. Losey, for his own use and benefit, borrowed of appellant's decedent, Jacob Hubner, a sum of money to be repaid in three years.

As evidence of the debt created by the loan, Robert C. Losey and his wife, Emma J., appellee herein, executed and delivered to said decedent a promissory note. At the same time, and to secure payment of the note, Emma J., her husband, Robert C., joining, executed and delivered to said decedent a mortgage upon her separate real estate. She executed the note and gave the mortgage as surety for her husband, and in no other capacity, the money neither having been borrowed nor used by her, nor used for her benefit in any way to make her property primarily liable.

On the 6th day of August, 1878, Robert C. Losey was discharged in bankruptcy from all of his debts, including said note.

On the 29th day of September, 1878, he and the decedent, payee of the note, without the consent or knowledge of Emma J., entered into an agreement which they indorsed upon the back of the note, as follows:

"In consideration of the extension of time for three years from September 2, 1878, and the reduction of the rate of interest from ten per cent to six per cent per annum, I hereby assume to pay promptly the interest at six per cent semi-annually, and the principal of the within note on or before September 2, 1881.

"R. C. LOSEY."

Subsequent to said agreement Robert C. paid several installments of interest on the note. At the time the note and mortgage were executed, and at the time the above written agreement was made, the payee and mortgagee knew that Robert C. and Emma J. Losey were husband and wife; that the real estate mortgaged was her separate property, and that she executed the note and mortgage as surety for her husband, and in no other capacity.

The above are substantially the facts specially found by the court below. Upon those facts the court rendered judgment in favor of the plaintiff, against Robert C. Losey, for the amount of the note, and for Emma J. for costs, having concluded as a matter of law,

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that by reason of the foregoing facts, the mortgage was discharged and satisfied, and her real estate released.

The question for decision here concerns the rights of the wife, Emma J. Under the present statutes, a wife may not mortgage her separate property to secure her husband's debts.

The mortgage in suit was executed in 1875. Under the statutes then in force, such a mortgage was valid. Its validity was not affected by the change in the statutes. It is well settled that a wife who has mortgaged her separate property for her husband's debt, when she may do so, is in the position of a surety, and entitled to all the rights of a surety, and that her liability and the mortgage lien are discharged by an extension of time of payment without her consent, if the extension be a binding obligation upon the mortgagee. Her rights in this respect are the same as if she were sole. *Trentman v. Eldridge*, 98 Ind. 525 (534), and cases there cited; *Bank of Albion v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479.

Relying upon this rule of law, counsel for Emma J. contend that the agreement between the husband and the decedent, the payee indorsed upon the back of the note, operated as an extension of the time of payment, and thus released her property.

In response to that contention, counsel for appellant contend in the first place, that the evidence does not show that the decedent, payee, at any time had notice that Emma J. was surety for her husband, and that hence she cannot avail herself of the rule which releases a surety by an extension of the time of payment, and in the second place, that she cannot avail herself of that rule for the reason that the husband had been discharged in bankruptcy, and thereby became a stranger to the note. These in their order. In order that an extension of the time of payment may release the surety, it is essential that the payee shall have knowledge of the suretyship. *Davenport v. King*, 63 Ind. 64; *McCloskey v. Indianapolis, etc., Union*, 67 Ind. 86; s. c., 33 Am. Rep. 76; *Arms v. Beitman*, 73 Ind. 85; *Gipson v. Ogden*, 100 Ind. 20.

When however a person accepts a mortgage in his favor upon the separate property of a married woman, knowing her to be a married woman, and that the property is her separate property, he is bound to inquire concerning the consideration, and ascertain, if he may, by reasonable inquiry from her, whether it is for the benefit of another, and unless misled by the conduct or representations of

the wife, he will be held to have acquired knowledge of the facts which prudent inquiry would have discovered. *Cupp v. Campbell*, 103 Ind. 213. See *Smith v. Townsend*, *supra*.

Under this rule, and under a less liberal rule, there is evidence sufficient to justify the court below in finding that the payee knew that Emma J. was a married woman, and that she was mortgaging her separate real estate to secure a debt of her husband, notwithstanding she signed the note with him. Being a married woman, she was not personally liable upon the note.

There was in the mortgage an agreement to pay the amount thereby secured. That agreement made the mortgage effective so far as the right to foreclose was concerned, but created no personal liability against her. *Trentman v. Eldridge*, *supra*. Robert C. Losey was discharged in bankruptcy from all his debts, including that for which the mortgage in suit was given. That discharge released him absolutely from all legal and personal liability upon the note, and the agreement to pay contained in the mortgage. *Root v. Espy*, 93 Ind. 511. Ordinarily a surety is released when the debt for which he is surety is discharged, and ordinarily a mortgage given to secure the payment of a debt, and having in it no promise to pay such debt, becomes ineffectual, and is barred when the debt is barred or in any way discharged. *Lilly v. Dunn*, 96 Ind. 220; *Bridges v. Blake*, 106 Ind. 332.

Those general rules apply where the discharge of the principal debt and debtor is by some act or neglect of the creditor, and not to a discharge by operation of law, being as it is, against the consent and beyond the power of the creditor. *Phillips v. Solomon*, 42 Ga. 192. In speaking of the rights and liabilities of sureties, and the effect of the bankrupt law thereon, the court there said: "We are inclined to think * * * that it was not the intent of Congress to do any thing more than to declare that the act should not be construed so as to discharge sureties, and that this was done not so much to fix the law of the case, as by way of caution to prevent the act from being construed to have an effect, that by its terms it would not have. In other words, the contract of a surety, as it is understood in the commercial world, is always conditioned that the surety shall not be discharged by the bankruptcy of the principal."

It was further said that the sections of the bankruptcy law upon the subject of sureties were only in furtherance, and declaratory of,

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what would have been true had those sections not been put in the act. The court also quoted with approval the following from Theobald on Principal and Surety: "The obligation of the surety also, in general, becomes extinct by the extinction of the obligation of the principal debtor. An exception to this rule takes place, whenever the extinction of the obligation of the principal arises from causes, such as bankruptcy and certificate, which originate with the law, and not in the voluntary acts of the creditor." See also *Gregg v. Wilson*, 50 Ind. 490; and to the same effect, 1 Pars. Notes and Bills, 249; 1 Pars. Cont. 29; *Ward v. Johnson*, 13 Mass. 148; *Blumenstiel Bankruptcy*, 543.

Whatever may have been the purpose or necessity of it, the bankrupt law under which Losey was discharged provided in explicit terms, that no discharge under it should release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as indorser or surety, etc. *Bump Bankruptcy* (9th ed.), 732, and cases there cited. See also *King v. Central Bank*, 6 Ga. 257; *Hall v. Fowler*, 6 Hill, 630; *Camp v. Gifford*, 7 Hill, 169; *Knapp v. Anderson*, 15 N. B. R. 316; *Gregg v. Wilson*, *supra*.

The above mentioned provision of the bankrupt act, as interpreted by the courts, and the general principles of the law, require a holding here that the mortgage in suit was not discharged by the discharge in bankruptcy of Robert C. Losey, the principal debtor. *In re Hartel*, 7 N. B. R. 559. See also *Catterlin v. Armstrong*, 101 Ind. 258.

Emma J., having mortgaged her property for the debt of Robert C., and thus occupying the position of surety, he was liable to her for whatever might be collected from her property in payment of the debt. In that sense, he was her debtor. She was in a position to have caused the debt, to secure which the mortgage was given, to be proved against the estate of the bankrupt debtor, in order that it might be reduced by whatever dividends were made, if any. Such proof was expressly authorized by the bankrupt law. And because that proof might have been made, the discharge of Robert C. Losey discharged him from all liability to Emma J. by reason of the mortgage. *Blumenstiel Bankruptcy*, 545; *Bump Bankruptcy*, 582; *Mace v. Wells*, 7 How. 272; *Baker v. Vasse*, 1 Cranch C. C. 194; *Hunt v. Taylor*, 4 N. B. R. 683; *Kerr v. Hamilton*, 1 Cranch C. C. 546; *In re Perkins*, 10 N. B. R. 529; *Brandt Suretyship*, § 189.

It results from what we have said, that after the discharge of Losey in bankruptcy, he was neither liable upon the notes nor otherwise to the payee, nor was he in any way liable to Emma J., who, by reason of the mortgage upon her separate property, occupied the position of surety.

Did then, the agreement between the bankrupt debtor and the payee and mortgagee, release her and her property as surety?

The rule is universal, that an extension of the time of payment by the creditor, by a binding contract with the principal, and without the knowledge and consent of the surety, will release the surety.

While there is no substantial disagreement between law authors and courts as to the reasons upon which the rule rests, there is some diversity in the statement of those reasons.

It is sometimes said that the reason why an extension of the time of payment discharges the surety is, that he would be entitled to the creditor's place by substitution, and the creditor, by agreement with the principal debtor for an extension of the time, without the surety's consent, disables him from suing when he would otherwise be entitled to do so, upon payment of the debt. The case of *Tiernan v. Woodruff*, 5 McLean, 350, was made to rest upon that reason. There, after the maturity of the note, and after the discharge in bankruptcy of the principal debtor, the creditor entered into a sealed agreement with him, without the knowledge or consent of the surety, and for a valuable consideration, that he, the creditor, would not, for the space of two months, commence any proceedings in law or equity, or otherwise, against him, the principal debtor upon the note. It was held that our bankrupt law extinguished the debt of the bankrupt, even against the surety; and that after the discharge of the principal debtor, the surety had no remedy but to present his demand against the estate of the bankrupt, and that he had no recourse against the bankrupt.

At the close of the opinion it was said: "The time given to Romeyn (the bankrupt), under these circumstances, by no possible means could have operated to the prejudice of the defendant (the surety). The settled rule of law therefore as to the effect of giving time to the principal debtor, does not and cannot apply in this case. After the extension complained of, as well as before it, the indorser could have proved the extent of his liability against the bankrupt's estate, and that was the only remedy, which under the circumstances the law gave him."

The same reason for the rule has been made prominent in some of our own cases. In some of the cases it has been said, that the agreement must be such as to tie the hands of the principal debtor, and fetter and embarrass the surety. *Wingate v. Wilson*, 53 Ind. 78; *Bucklen v. Huff*, 53 Ind. 474; *Dickerson v. Board, etc.*, 6 Ind. 128; s. c., 63 Am. Dec. 373; *Harbert v. Dumont*, 8 Ind. 346.

Citing the case of *Tiernan v. Woodruff*, *supra*, Judge STORY, in his work on Promissory Notes, at section 415, in speaking of an extension of the time of payment by the creditor, said: "Or, if being for a valid consideration, it be of such a nature that the maker can by law obtain and entitle himself to the same delay without the consent of the holder (as where the holder had been already discharged from the note in bankruptcy), then the agreement will not operate as a discharge of the indorsers, for the reason that the indorsers cannot, under such circumstances, be injured by the delay, or if injured, it is by operation of law, and not dependent upon the act of the holder."

Citing that case also, Mr. Daniel, in his work on Negotiable Instruments, at section 1313, said: "The reason why extension of time of payment discharges the surety is that he would be entitled to the creditor's place by substitution; and if the creditor, by agreement with the principal debtor, without the surety's assent, disables himself from suing when he would be otherwise entitled to do so, and thus deprives the surety, on paying the debt, from immediate recourse on his principal, the contract is varied to his prejudice—hence he is discharged. But this principle on which sureties are released 'is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties by which they are supposed to be injured.' Therefore when there is a legal impossibility of injury, the principle does not apply. This was decided to be the case where the maker of a note was a discharged bankrupt; and an agreement between him and the holder for two months' delay, although on a valid consideration, it was held did not discharge the indorser, because the latter could not, by making payment, have recourse against him."

If the rule releasing sureties by an extension of the time of payment rested upon the reason above mentioned, and upon none other, it would perhaps be the duty of the court to hold here, that the mortgage by Emma J. was not released by the agreement made and indorsed upon the back of the note. But the rule, we

think, rests also upon another reason, quite as important and controlling as that already named, and that is, that a valid and binding agreement between the creditor and the principal debtor, without the consent or knowledge of the surety, for an extension of the time of payment, is a modification or alteration of the contract for the performance of which the surety obligated himself, or bound his property.

That reason is recognized, if not asserted, in some of our own cases. The general doctrine, with an exception which we need not here notice, as declared by all of the authorities, is that in order to release the surety, there must be a new contract between the creditor and principal debtor, fixing the time of payment at a different date from that fixed in the original contract; that the contract for extension must be based upon a new and sufficient consideration, and that the extension must be to a fixed time, so that the contract may embody the necessary elements of certainty; in short, that the contract for extension must embody the necessary elements of a valid and binding contract. See *Wingate v. Wilson*, *supra*; *Chrisman v. Perrin*, 67 Ind. 586; *Hogshead v. Williams*, 55 Ind. 145; *Coman v. State*, 4 Blackf. 241; *Harter v. Moore*, 5 Blackf. 367.

In the case of *Pierce v. Goldsberry*, 31 Ind. 52, it was said, in speaking of the release of sureties by an extension of the time of payment: "It takes from the surety a right which he had under the contract into which he entered, the exercise of which may be essential to his indemnity." And again: "Sureties are favorites, and will not be held beyond the strict scope of their engagements."

In Daniel on Negotiable Instruments, at section 1312, it is said: "The principle that whatever discharges the principal discharges the surety is of extended application, and it is operative whenever any thing is done which relaxes the terms of the exact legal contract by which the principal is bound, or in anywise lessens, impairs, or delays the remedies which the creditor may resort to for its assurance or enforcement."

In Story on Promissory Notes, at section 414, is this: "On the other hand, the indorsers, by such an agreement for credit or delay for a prolonged period without their concurrence, would, if the doctrine were not as above stated, be held liable for a period beyond their original contract, and might suffer damage thereby; or at all events, would be bound by a different contract from that into which they had entered."

In stating the reason of the rule releasing sureties by an extension of the time of payment, Mr. Brandt, in his work on Suretyship, at section 206, said: "The reason is, that the surety is bound only by the terms of his written contract, and if those are varied without his consent it is no longer his contract, and he is not bound by it. It therefore follows that the fact that the principal is insolvent, or that the extension would be a benefit to the surety if he remained bound, makes no difference in the rule. Moreover the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment."

In the case of *Idle v. Churchill*, 14 Ohio St. 372 (383-4), Judge RANNEY said: "Every contract is composed of the material terms and stipulations embraced in it, and among these none is more important than the time of performance. It follows, from the principles already stated, that whatever changes any of these material terms and stipulations, so as to destroy the identity of the obligation to which the surety acceded, necessarily discharges him from liability. An engagement to pay money in six months, is not the same as one to pay it in twelve months; and if the creditor, by a valid agreement with the debtor, extends the time of performance from the shorter to the longer period, he supersedes the old obligation by the new, and cannot enforce payment until the longer period has elapsed. If the surety is sued upon the old agreement, to which alone his undertaking was accessory, he has only to show that that has ceased to exist, and no longer binds his principal, and if he is sued upon the substituted agreement, he is entitled, both at law and in equity, to make the short and conclusive answer, *non hæc in fœdera veni*. But such an agreement between the principal parties is perfectly valid and legal, and until some method can be devised for depriving the principal of the benefits of a valid agreement, or of binding the surety to an agreement to which he never acceded (a work hitherto thought not to be within the powers of either courts or legislatures), the discharge of the latter must ensue. I am very well aware, that this discharge has been often thought to rest upon the injurious consequences of such arrangements, either real or possible, upon the rights and interests of the surety, and undoubtedly in most cases, such would be their necessary tendency. But if it rested upon this ground alone, it would be very difficult

upon equitable principles to extend the relief beyond the actual injury; while it is universally agreed that they work a total discharge, and extend to cases where no possible injury to the surety could have ensued."

In line with the above case, see *Valley National Bank v. Meyers*, 17 N. B. R. 257; *Huffman v. Hulbert*, 13 Wend. 375; *Schnewind v. Hackett*, 54 Ind. 248.

In the case of *Haden v. Brown*, 18 Ala. 641, it was held, as in the Ohio case, *supra*, that the surety was discharged by an extension of the time of payment, because such an extension was a change and alteration of the contract.

A surety is bound only by the strict terms of his engagement.

He assumes the burdens of a contract without sharing its benefits. He has a right to prescribe the exact terms upon which he will enter into an obligation, and insist upon his discharge if those terms are not observed. It is not a question whether he is harmed by a deviation to which he has not assented. He may plant himself upon the technical objection, *non hæc in fœdera veni*—this is not my contract. *Markland Mining and Mnfg. Co. v. Kimmel*, 87 Ind. 580; *Wood Sewing Machine Co. v. Winchel*, 107 Ind. 260; *City of Lafayette v. James*, 92 Ind. 240; s. c., 47 Am. Rep. 140.

In the case before us, Emma J. mortgaged her separate property as security for the performance of the contract between her husband, the debtor, and appellant's decedent, the payee, as that contract was evidenced by the note. That contract, as thus evidenced, measured and fixed the manner and extent to which her property was to become liable. *Irwin v. Kilburn*, 104 Ind. 113; *Wood Sewing Machine Co. v. Winchel*, *supra*.

If then there has been a modification or alteration of that contract, the mortgage cannot be foreclosed. If there has been such a change or modification, the property of Emma J. cannot be made liable as security for the original contract, because it no longer exists as originally made, nor as security for the contract as changed, because that would be to make the surety liable beyond the scope of the contract. The note is not the contract, but the evidence of it. In some of the cases above cited, it was expressly held that an agreement between the creditor and principal debtor for an extension of the time of payment, not indorsed upon the note or written instrument, so far as appears, operated as a modification and change of the contract as evidenced by the note or written instrument.

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Here Losey, the principal debtor, and the payee, not only agreed that the time of payment should be extended beyond the time as originally agreed upon and named in the note, but also agreed upon a rate of interest for the future different from that originally agreed upon and named in the note. Not only that, but they indorsed the agreement upon the note. The agreement thus indorsed upon the note operated as a modification and change of the original agreement. In other words, after the consummation of the latter agreement, indorsed upon the back of the note, Losey and the payee were no longer bound by the agreement as written upon the face of the note, but by that agreement as modified and changed by the subsequent agreement indorsed upon the back of the note. After that indorsement, their agreement was to be ascertained by an examination of the face of the note and the indorsement. The two writings are to be construed together. Together they constitute the contract between Losey and the payee. To hold otherwise, would be to hold that the latter agreement was and is of no validity whatever. The latter agreement, by its terms, is to pay the note as written, with a change in time and rate of interest. That there was a sufficient consideration for that agreement there can be no doubt. In consideration of the change of time and rate of interest, Losey exchanged a moral obligation only for a legal liability.

In our conclusion that the contract between Losey and the payee is evidenced by the face of the note and the indorsement upon the back of it, we are fully supported by the cases of *Beckner v. Carey*, 44 Ind. 89, and *Harden v. Wolfe*, 2 Ind. 31. It is not easy, if it is possible, to reconcile with those cases the cases of *Huff v. Cole*, 45 Ind. 300, and *Bucklen v. Huff*, 53 Ind. 474, from the opinion in each of which cases, it may be remarked, there was a dissent by one of the judges. There are some differences between the indorsement upon the back of the note in the case before us and the indorsement upon the back of the notes in those cases. The cases may therefore be distinguishable. But if there were no differences, we should disapprove those cases and follow the cases of *Beckner v. Carey*, and *Harden v. Wolfe*, *supra*. The contract between Losey and the payee, as evidenced by the face of the note and the indorsement upon the back of it, is not the contract between them as it existed at the time Emma J. executed the mortgage, and to secure the performance of which on the part of Losey she mortgaged her separate property. Losey and the payee changed that contract with-

out her consent or knowledge by agreeing upon a different rate of interest and a different time for payment. .

The contract to secure which she mortgaged her property can be enforced by no one, and for the contract as changed neither she nor her property is liable. To hold her property liable upon the original contract as evidenced by the note, would be to hold it liable for the default in payment by Losey, three years before he could be in default under the contract as changed; and to hold her property liable upon the changed contract, would be to hold it liable for a contract different in time of payment and rate of interest from that which entered into and formed a part of the contract as evidenced by the mortgage. To hold her property liable upon the original contract would be to measure the liability of the principal by one standard, and the liability of the surety by another and different standard. But it is said, that because Losey had been discharged in bankruptcy from all his debts, he became a stranger to the note, and that therefore the change in the contract agreed to by him cannot affect Emma J. or the mortgage given by her.

In answer to that it is sufficient to say, in the first place, that by his discharge Losey did not become, in every sense, a stranger to the note. The discharge released him from all legal liability upon it, and in that sense extinguished the debt; but it did not pay the debt, nor release him from the moral duty of paying it. The moral obligation was a sufficient consideration for his subsequent promise to pay it. *Hockett v. Jones*, 70 Ind. 227; *Shockey v. Mills*, 71 Ind. 288; s. c., 36 Am. Rep. 196; *Meech v. Lamon*, 103 Ind. 515; s. c., 53 Am. Rep. 540; *Wills v. Ross*, 77 Ind. 1; s. c., 40 Am. Rep. 279; *Jenks v. Opp*, 43 Ind. 108.

In the second place, the bankruptcy of Losey did not destroy, change or affect the contract of the surety. Emma J. mortgaged her property to secure the performance of the contract between Losey and the payee as it existed at the time the mortgage was executed. The discharge of Losey from legal liability upon that contract did not, and could not, affect her rights. His discharge from legal liability upon the contract did not destroy or alter it. To hold that it did, would be to hold that it absolutely released the mortgage. The contract between Losey and the payee, so far at least as the surety was concerned, remained the same after as before the discharge of Losey.

The only difference was, that by reason of his discharge, he was no longer legally liable upon the contract. He might however

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waive the immunity afforded by his discharge, and pay the debt according to the terms of the note. To secure the performance of the contract according to the terms of the note, and in no other way, the separate property of Emma J. was mortgaged. In order that Losey might again become liable for the payment of the principal sum, the payee consented that the contract might be changed as to the time of payment and the rate of interest. The contract, as evidenced by the face of the note and the indorsement upon the back of it, thus became the contract between Losey and the payee. By the change, the contract as originally executed ceased to exist, both as a legal and moral obligation on the part of Losey. And this is so, whether the new promise be regarded as a revival of the original contract, so far as consistent with it, or whether it be regarded as an entirely new contract.

This suit is really upon the changed contract, because copies of the face of the note and the indorsement upon the back of it are both filed with the complaint as the cause of action.

In any view that may properly be taken of the case, it must be held that the property of Emma J. is no longer liable. As the court below so ruled, the judgment is affirmed, with costs.

HAVENS V. HOME INSURANCE COMPANY.

(111 Ind. 90.)

Insurance — stipulation against other insurance — waiver — indivisible risk.

A policy of fire insurance stipulated that "if the assured shall have or shall hereafter make any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, this policy shall be void." After the policy was executed an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy. Other valid insurance was taken, but without any notice to the company or request to insert the stipulation agreed upon. *Held*, that the policy was avoided.

Where a building and the furniture in it were insured by one policy for one gross premium, although in separate amounts, the contract must be treated as entire; and is wholly avoided by a breach as to either part.

ACTION on an insurance policy. The opinion states the case. The defendant prevailed below.

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J. F. McDowell, H. Brownlee, G. A. Henry, F. M. Finch and J. A. Finch, for appellant.

B. Harrison, W. H. H. Miller and J. B. Elam, for appellee.

MITCHELL, J. This action was brought by Sarah Havens upon a policy of fire insurance issued to her by the Home Insurance Company of New York, on the 2d day of December, 1883. The insurance was for the period of one year, against loss or damage by fire, to the amount of \$2,000, as follows: \$1,500 upon the hotel buildings of the assured in Marion, Indiana, and \$500 on her furniture and household goods therein. Among other stipulations the policy contained the following: "If the assured shall have or shall hereafter make any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, * * * this policy shall be void." There was also the following stipulation in the policy: "The use of general terms or any thing less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein."

The first paragraph of the complaint alleged the execution of the policy, and that the property thereby insured had been destroyed by fire on the 30th day of November, 1884, and that due proof of loss had been made, etc. This paragraph contains the following averment: "The plaintiff further avers that it was expressly agreed and understood that said plaintiff was to have permission to take out an additional insurance of \$1,000 on said building in any other company and at any time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. And plaintiff says, that relying upon said promise, and in pursuance of said contract and agreement, she had effected an insurance on said building in the sum of \$1,000, in the Phenix Insurance Company of Brooklyn, New York, * * * as permitted by the express agreement aforesaid."

The court below sustained a demurrer to this paragraph of the complaint.

The appellant's claim is, that the averments above set out in effect show that the insurance company agreed or consented that the assured might procure other insurance on the building, and that having so consented, it is now estopped to assert that there has been

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a breach of the condition because the consent of the company was not indorsed on the policy. It is said the agreement amounted to a waiver of the condition requiring that the consent of the company to other insurance should be so indorsed.

Insurance policies are prepared by the companies, and contracts of insurance are usually consummated by experts on the one hand, and inexperts on the other. The policy of the law is therefore to give them such an interpretation as to prevent a forfeiture whenever upon principles of fair construction such a result is possible.

It is abundantly settled that notwithstanding conditions in the policy, if at the time the insurance was effected, or afterward, there were conditions, uses or incidents of the risk which were in conflict with conditions in the policy, and which were known to the insurer, or its agent, whose knowledge is imputable to the company, such conditions, uses or incidents cannot be used to defeat a recovery after a loss has occurred.

Issuing or continuing a policy of insurance, with full knowledge by the company of existing facts, which according to a condition of the contract make it voidable, is a waiver of the condition. If it were otherwise, the company would be enabled to perpetrate a fraud upon the assured. *Home Ins. Co. v. Duka*, 84 Ind. 253; *Etna Ins. Co. v. Shryer*, 85 Ind. 362; *Excelsior, etc., Ass'n v. Riddle*, 91 Ind. 84; *Indiana Ins. Co. v. Capehart*, 108 Ind. 270.

Thus it has been held in a somewhat analogous case, notwithstanding an insurance policy contained printed stipulations almost identical with those above set out, in respect to obtaining other insurance and in respect to matters which should not be construed as a waiver of any condition or restriction contained in the policy, yet where an agent, whose authority was not shown to have been restricted, inserted in the policy, "\$3,000, other insurance permitted," and who was shown to have had knowledge that other insurance had been obtained, but conveyed to the insured the impression that the written consent of the company was not necessary, that the insurance company was estopped to dispute the validity of the additional insurance. *Westchester Fire Ins. Co. v. Earle*, 33 Mich. 143; *Hadley v. Insurance Co.*, 55 N. H. 110; *Pitney v. Glens Falls Ins. Co.*, 65 N. Y. 6; *American Ins. Co. v. Luttrell*, 89 Ill. 314.

The tendency of the modern cases is to hold, that if notice be duly given to the company or its agent of additional insurance, or if actual

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knowledge is brought home that other insurance exists, or has been obtained, and no objection is made, the company will be estopped from insisting on a forfeiture because its consent was not indorsed on the policy. *Wood Fire Ins.*, §§ 382, 383; *May Ins.*, §§ 369, 370. Having knowledge of the other insurance, the company may manifest its dissent by cancelling its policy; otherwise it will be treated as having assented, and waived compliance with the condition.

This does not deny to insurance companies the right to impose conditions upon which they will assume risks; it does nothing more than to prevent them from taking advantage of conditions, when they have full knowledge of incidents and facts connected with the risk, which are inconsistent with the conditions imposed. It should be observed that the authorities make a distinction in this regard between mutual insurance companies, whose charters require that the consent of the company shall be indorsed on the policy in respect to certain matters, and such companies as regulate the subject-matter under consideration by contract merely.

The principles relied on, although abundantly supported, as controlling in cases somewhat analogous to this, do not reach the necessities of the appellant's case. The case made by the first paragraph of the complaint proceeds upon the theory that another valid policy of insurance had been taken out by the assured in the *Phenix Insurance Company of Brooklyn, New York*, after the issuance of the policy in suit, and before the destruction of the property by fire. It seeks to avoid the effect of the condition providing for a forfeiture of the policy, by the averment that it was agreed that the plaintiff should have permission to take out additional insurance, to the amount of \$1,000, in any company, and at any time she desired to do so, and that the company agreed to insert such a stipulation in the policy, but wholly failed to insert the stipulation as agreed. It does not appear when this agreement was made, whether before or after the execution of the policy. If it was made before, it does not appear that the appellant was induced to accept the policy without full knowledge that the stipulation was absent, nor does the complaint ask for a reformation of the contract. The appellant argues that a fair reading of the contract leads to the conclusion that it was made subsequent to the issuing of the policy. If this be conceded, it in no wise helps the appellant.

If it were admitted that the oral agreement relied on was valid, it effects no substantial modification of the original contract. In

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any event permission to take other insurance was to be in writing. Such permission could only have been given by the assured presenting the policy to the company or its agent, and requesting that the stipulation be written in or upon the policy.

After its execution the policy was presumably in the possession of the assured. It does not appear that she ever requested that the stipulation orally agreed upon should be inserted, or that the company or its agent ever had any notice that she had taken or desired to take additional insurance. The company was therefore guilty of no neglect or wrong.

The position of the appellant comes to this: After the policy was executed, an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy. Other valid insurance was taken, without any notice to the company or request to insert the stipulation agreed upon, and now it is said the company is estopped to insist upon the condition printed in the policy. This position is not sustainable. As has been seen, insurance companies are estopped to insist upon the enforcement of conditions when they have knowledge of existing facts which are inconsistent with the conditions imposed. Knowledge of the facts raises a presumption that the company waived the condition, and upon principles of honesty and fair dealing, the law holds it estopped to say to the contrary when such knowledge is shown. Admitting all the facts pleaded to be true, the insurance company has been guilty of no misconduct upon which an estoppel can be predicated. The assured has chosen to stand upon the policy as she received it. With the concession in her complaint that she violated a condition of the policy by taking other insurance without the consent of and without notice to the company or its agent, the court could not have done otherwise than sustain the demurrer.

The second paragraph of the complaint waived any right or claim to recover for the destruction of the building, and proceeded only for the loss of the furniture and household goods covered by the policy. To this paragraph the company answered the condition against obtaining other insurance on the property insured, or any part thereof, without the written consent of the company, and alleged that since the issuance of the policy sued on, other valid insurance had been so obtained upon the hotel building. The answer further averred, that the furniture covered by the policy was

contained and used in the hotel, and that both formed one risk, and were insured by the same contract and upon one and the same consideration. This was held to be a sufficient answer.

Since part of the insurance was apportioned to the building, and part to the furniture and household goods therein, the question presented is, whether it was competent for the plaintiff to recover that part apportioned to the furniture and household goods, notwithstanding the policy had been voided as to the building. On appellant's behalf, the argument is, that the contract is divisible, and that it does not follow that because it was voided as to the building, it should also be voided in respect to the furniture.

There is apparently some contrariety of opinion as to the construction of contracts of insurance, and as to the right of the assured to recover in cases somewhat analogous to that under consideration. Where the contract is entire, it seems to be conceded that a breach of condition affects the entire risk, but the authorities are not uniformly agreed as to what constitutes an entire contract, as applied to policies of insurance. So far as we are apprised, the question presented has not been heretofore considered by this court.

Confining the decision to the case in hand, our conclusion, after a careful examination of the authorities, is, that the policy under consideration is to be treated as an entire, indivisible contract in respect to the condition in question.

The purpose of inserting conditions against other insurance in policies manifestly is to protect the company from the hazard of over-insurance, by compelling the assured to continue to be personally interested in the preservation of his property. The condition assumes that the vigilance of the property-owner will be stimulated, and that he will be more watchful to guard against fire in case his relation to the property is such that its destruction by fire will entail a loss rather than a benefit upon him. *Phenix Ins. Co. v. Lamar*, 106 Ind. 513; s. c., 55 Am. Rep. 764. In order therefore to give effect to the condition, according to the intent and purpose of the contract, it follows necessarily that where the property covered by one policy, although consisting of separate items, appears to be so situate as to constitute substantially one risk, then even though separate amounts of insurance be apportioned to each separate item or class of property, if the considera-

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tion for the contract, and the risk, are both indivisible, the contract must be treated as entire nevertheless. To such a policy the principles governing entire and indivisible contracts are applicable, for the reason that the matter which renders the policy void as to part affects the risk of the insurer in respect to the other items in the same manner as it affects those items in respect to which the contract is voided. In such a case the only effect of apportioning the amount of the insurance upon the separate items of property specified in the policy is to limit the extent of the company's liability to the sum specified upon each item or class of property insured.

While many well-considered cases seem to justify a much broader conclusion than that above stated, in regard to the indivisibility of insurance contracts, we believe that in the main the authorities may be harmonized on the principles above stated, which we regard as the better view of the subject. *Aetna Ins. Co. v. Resh*, 44 Mich. 55; s. c., 38 Am. Rep. 228; *McGowan v. People's M. F. Ins. Co.*, 54 Vt. 211; s. c., 41 Am. Rep. 843; *Gottsmann v. Pennsylvania Ins. Co.*, 56 Penn. St. 210; *Schumitsch v. American Ins. Co.*, 48 Wis. 26; *Hinman v. Hartford F. Ins. Co.*, 36 Wis. 159; *Plath v. Minnesota, etc., Ins. Ass'n*, 23 Minn. 479; s. c., 23 Am. Rep. 697; *Bowman v. Franklin F. Ins. Co.*, 40 Md. 620; *Moore v. Virginia, etc., Ins. Co.*, 28 Gratt. 508; s. c., 26 Am. Rep. 373; *Lovejoy v. Augusta M. F. Ins. Co.*, 45 Me. 472; *Richardson v. Mains Ins. Co.*, 46 Me. 394; *Gould v. York Co. M. F. Ins. Co.*, 47 Me. 408; *Barnes v. Union M. F. Ins. Co.*, 51 Me. 110; *Day v. Charter Oak, etc., Ins. Co.*, 51 Me. 91; *Lee v. Howard F. Ins. Co.*, 3 Gray, 583; *Kimball v. Howard F. Ins. Co.*, 8 Gray, 38; *Freismuth v. Agawam M. F. Ins. Co.*, 10 Cush. 587; *Brown v. People's Mutual Ins. Co.*, 11 Cush. 280; *Garver v. Hawkeys Ins. Co.*, 69 Iowa, 202; *Wood Fire Ins.*, § 165.

In the following, among other cases, which involved suits upon insurance policies, wherein different properties were insured for separate sums, the contracts were held divisible, and the policyholder, in each instance, allowed to recover as to some of the separate items, notwithstanding there had been a violation of some condition which avoided the policy as to other items included in the same policy. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452; s. c., 29 Am. Rep. 184; *Trench v. Chenango Co. M. Ins. Co.*, 7 Hill, 122; *Koontz v. Hannibal, etc., Ins. Co.*, 42 Mo. 126; *Loeh-*

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ner v. Home M. F. Ins. Co., 17 Mo. 247; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 53; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; s. c., 5 Am. Rep. 115.

While we concur in the suggestion that courts incline toward such a liberal construction of insurance contracts in favor of the assured as, if possible, to avoid a forfeiture, yet where parties have, without fraud, mistake or surprise, deliberately entered into a contract, that alone must be looked to as furnishing the measure of their respective rights and obligations. *Phenix Ins. Co. v. Lamar, supra*. Courts cannot by construction compel insurance companies to assume obligations which they have fairly guarded against, in order to protect themselves against imposition, so that their solvency may be legitimately preserved, in order to afford indemnity to policy-holders who observe their contracts.

In the case under consideration the risk on the furniture was affected by the same cause that rendered the policy void upon the building. It follows that the policy was avoided *in toto*.

The judgment is affirmed, with costs.

Judgment affirmed.

WABASH, ST. LOUIS AND PACIFIC RAILWAY COMPANY V. FARVER.

(111 Ind. 195.)

Negligence — nuisance — contractor.

The owner of a portable steam-engine contracted with a railroad company to pump the water from an excavation on the land of the company near the highway. The plaintiff, driving on the highway, was injured by reason of his horse's fright at the engine. The defendant had no control over the use of the engine. *Held*, that it was not liable. (*See note, p. 700.*)

ACTION for personal injuries by negligence. The opinion states the case. The plaintiff had judgment below.

C. B. Stuart and *W. V. Stuart*, for appellant.

C. E. Emanuel, for appellee.

MITCHELL, J. This action was brought by Farver against the railway company to recover damages for personal injuries alleged to have been sustained by him while lawfully pursuing his way

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along a public highway in a carriage which was overturned in consequence of his horse having taken fright at a portable steam-engine, alleged to have been negligently placed in or near the highway by the company. The confused state of the record makes it difficult to determine whether the case was tried upon one or both the complaints which are copied into the transcript. Although the one filed last is styled an amended complaint, the subsequent proceedings indicate that both were treated as in the record. The case seems to have been tried upon that theory.

Counsel are at variance however as to this matter, but the view we take of the case makes it quite immaterial whether it be one way or the other.

The evidence tends to show without conflict or substantial dispute, that in September, 1882, the railway company was engaged in constructing a well or reservoir, from which to supply a water station on the line of its road, near Auburn, Indiana. Running water interfered with the work, and it became necessary to cause the accumulating water to be pumped out of the way, so as to prevent it from running into the well or reservoir which was in process of construction. The construction of the well and laying pipes thence to the water station had been committed to the charge of a Mr. Kress, an employee of the railway, who with a force of men under his control was engaged in providing means to supply the station with water. Williams, who resided in or near Auburn, was the owner of a small portable steam-engine, which he was accustomed to employ in sawing wood, threshing grain, pumping water, and the like as opportunity offered. He contracted with Kress, for a stipulated *per diem*, to furnish and operate his engine in pumping, at such times as might be necessary, in order to keep the water from interfering with the work which the latter was constructing. Williams agreed to furnish his engine and personally superintend the running of it, and to provide and pay for such assistance as he needed in keeping the water from obstructing the progress of the work. If it became necessary that he should run the engine at night he was to receive extra compensation.

In pursuance of this agreement the latter placed his engine in a vacant lot, some six feet or more outside the line of a public highway which intersected the railway company's line at or near the point where the reservoir was being constructed. So far as appears, he selected the location of the engine, and controlled its operation, as

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the work he engaged to do required. When the accumulated water was pumped down to a certain level, or when persons were passing on the highway, the engine was stopped, and when the water rose to a certain height the pumping was resumed. While Williams was thus engaged in carrying out his agreement, the plaintiff's horse, in passing along the adjacent highway, took fright at the engine, and became unmanageable. The plaintiff was thrown from his carriage and injured. The question is, whether under the circumstances the railway company is liable for the negligence of Williams, assuming that he was negligent in operating his engine so near the public highway.

The rule which controls in cases of this class has become well established, and has more than once been recognized and applied by this court. *Ryan v. Curran*, 64 Ind. 345; s. c., 31 Am. Rep. 123; *Sessengut v. Posey*, 67 Ind. 408; s. c., 33 Am. Rep. 98; *City of Logansport v. Dick*, 70 Ind. 65; s. c., 36 Am. Rep. 166.

Under this rule, where work which does not necessarily create a nuisance, but is in itself harmless and lawful, when carefully conducted, is let by an employer, who merely prescribes the end, to another who undertakes to accomplish the end prescribed, by means which he is to employ at his discretion, the latter is, in respect to the means employed, the master. If during the progress of the work a third person sustains injury by the negligent use of the means employed and controlled by the contractor, the employer is not answerable. The inquiry in such a case is, did the relation of master and servant subsist between the person for whom the work was done, and the person whose negligence occasioned the injury? If in rendering the service, the person whose negligence caused the injury was in the course of accomplishing a given end for his employer, by means and methods over which the latter had no control, but which were subject to the exclusive control of the person employed, then such person was exercising an independent employment, and the employer is not liable. If on the other hand the end to be accomplished was unlawful, or if in and of itself it necessarily resulted in the creation of a nuisance, or in making a place dangerous which the employer was under a peculiar obligation to keep secure, then, regardless of the relation which existed between the employer and the person whose negligent conduct caused the injury, the employer is liable for a breach of duty. *Cuff v. Newark, etc., R. Co.*, 35 N. J. Law, 17; s. c., 10 Am. Rep. 205; *Smith v.*

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Simmons, 103 Penn. St. 32; s. c., 49 Am. Rep. 113; *Harrison v. Collins*, 86 Penn. St. 153; s. c., 27 Am. Rep. 699; *School District, etc., v. Fuess*, 98 Penn. St. 600; s. c., 42 Am. Rep. 627; *Hunt v. Penn. R. Co.*, 51 Penn. St. 475; *Callanan v. Burlington, etc., R. Co.*, 23 Iowa, 562; *Eaton v. European, etc., Ry. Co.*, 59 Me. 520; s. c., 8 Am. Rep. 430; *De Forrest v. Wright*, 2 Mich. 368; *Moore v. Sanborne*, 2 Mich. 519; s. c., 59 Am. Dec. 209; *Corbin v. American Mills*, 27 Conn. 274; s. c., 71 Am. Dec. 63; *Bailey v. Troy, etc., R. Co.*, 57 Vt. 252; s. c., 52 Am. Rep. 129; *Wood Mast. and Serv.*, § 313 *et passim*; *Cooley Torts*, 548. The application of the foregoing principles to the facts in hand leads to the conclusion that the appellant was not liable.

The work contracted to be done was not in itself unlawful, nor was it necessarily a nuisance to operate a portable steam-engine in a careful manner in close proximity to a public highway. Injury could only result from its negligent use. It would not do to say that the operation of a portable engine, near a public highway, necessarily resulted in creating a nuisance, when it is according to daily experience, during certain seasons of the year, to see steam threshing-machines in operation on every hand, and often necessarily close to public highways. Road engines propelled by steam, and portable engines operated by steam, have become familiar in every agricultural community. To declare that their use near, or their passage over a public highway constituted a nuisance would be practically to prohibit their use in the manner in which they are customarily employed and moved from place to place. It must be supposed that horses of ordinary gentleness have become so familiar with these objects as to be safe, when under careful guidance. *Piollet v. Simmers*, 106 Penn. St. 95; 51 Am. Rep. 496; *Gilbert v. Flint, etc., Ry. Co.*, 51 Mich. 488; s. c., 47 Am. Rep. 592; *Macomber v. Nichols*, 34 Mich. 212; s. c., 22 Am. Rep. 522.

Now as to the relation between the railway company and Williams, keeping in view the rule that where an employee is exercising an independent employment, and is not under the control and direction of the employer, the latter is not responsible for the negligence or misdoings of the former. *King v. New York Cent., etc., R. Co.*, 66 N. Y. 181; s. c., 23 Am. Rep. 37. It is nowhere denied but that Williams was employed to furnish and superintend the running of his engine, to the end that the water might be pumped out

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of the way, so as to admit of the prosecution of the work in which the railway company was engaged. In respect to the engine, and the manner of operating it, he was the sole master, and had the right to employ whomsoever he pleased to assist him. Neither the railway company nor any of its employees had the right to run the engine, or to interfere in the manner of its running, or to direct its owner how or when it should be run. The only right the company had in respect to the matter was to require Williams to accomplish the end of keeping the water out of the way of its workmen. In respect to his engine and its control, and his liability for its negligent use, the latter was as much an independent contractor when pumping water for the railway company as when sawing wood or threshing wheat for persons in the neighborhood. His relation to the railway company, while executing his contract for it was precisely the same as to others, while executing work for them with his engine under contracts. It would be a startling proposition to affirm that every person who employs the owner of an engine and machinery to saw wood or thresh his crop would be liable to any person who might be hurt through the negligence of the operator or his assistants, although the employer had no control over the machinery and no immediate direction over those engaged in its operation.

The conclusion thus reached upon the facts renders it unnecessary that we should examine in detail all the various questions discussed in the briefs. The evidence does not sustain the finding. The court erred in overruling the motion for a new trial.

Judgment reversed, with costs.

NOTE BY THE REPORTER.—The following cases reported in this series hold that certain things do not amount to a nuisance rendering the employer liable for the act of the contractor:

Making an excavation in sidewalk during erection of a building. *Ryan v. Curran*, 64 Ind. 345; s. c., 31 Am. Rep. 123; same principle, *Myers v. Hobbs*, 57 Ala. 175; s. c., 29 Am. Rep. 719. Storing nitro-glycerine; *Cuff v. Newark, etc., R. Co.*, 35 N. J. L. 17; s. c., 10 Am. Rep. 205. Ditch in street for water-pipe; *Smith v. Simmons*, 108 Penn. St. 83; s. c., 49 Am. Rep. 118. Fire to clear land; *Ferguson v. Hubbell*, 97 N. Y. 507; s. c., 49 Am. Rep. 544. Opening coal-hole in sidewalk to put in a rigger; *Harrison v. Collins*, 86 Penn. St. 153; s. c., 27 Am. Rep. 699. Dangerous excavation on school premises; *School District v. Fuess*, 98 Penn. St. 600; s. c., 43 Am. Rep. 627. Allowing fires to communicate; *Eaton v. European, etc., Ry. Co.*, 59 Me. 520; s. c., 8 Am. Rep. 430. Use of steam-shovel on land near highway; *Bailey v. Troy & Boston R.*

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Co., 57 Vt. 252; s. c., 53 Am. Rep. 129. Barrel on wheels, used in whitewashing fence along road; *Piollet v. Simmers*, 106 Penn. St. 95; s. c., 51 Am. Rep. 496. Box freight car standing at highway and railway crossing; *Gilbert v. Flint, etc., Ry. Co.*, 51 Mich. 488; s. c., 47 Am. Rep. 592. Unsafe derrick; *King v. N. Y. Cent., etc., R. Co.*, 66 N. Y. 181; s. c., 28 Am. Rep. 87. Excavation under sand-bank; *Fink v. Mo. Furnace Co.*, 82 Mo. 276; s. c., 52 Am. Rep. 876. Hanging scaffold to paint house; *Hexamer v. Webb*, 101 N. Y. 877; s. c., 54 Am. Rep. 708. Trap-door left open by plumbers; *Bennett v. Truebody*, 66 Cal. 509; s. c., 56 Am. Rep. 117.

The following are cases to the contrary; Unsafe party-wall; *Gorham v. Gross*, 125 Mass. 282. Ruinous wall after a fire; *Sessengut v. Posey*, 67 Ind. 408; s. c., 33 Am. Rep. 98. Opening in plank barrier letting in tide-water; *Sturges v. Theo. Ed. Soc.*, 130 Mass. 414; s. c., 39 Am. Rep. 463. Blasting in constructing a street; *City of Logansport v. Dick*, 70 Ind. 65; s. c., 36 Am. Rep. 166. Materials obstructing street; *Wilson v. White*, 71 Ga. 506; s. c., 51 Am. Rep. 269.

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(111 Ind. 342.)

Marriage — estoppel of married woman.

Although a wife's separate estate is not ordinarily bound by her engagement as surety, yet it is bound if at the time of contracting, she represents that the engagement is for her own benefit.

ACTION on notes and mortgage. The opinion states the case. The plaintiff had judgment below.

C. F. McNutt, J. G. McNutt, S. C. Davis, S. B. Davis and I. N. Pierce, for appellants.

H. B. Jones, for appellee.

ELLIOTT, J. The appellee's complaint is founded upon promissory notes executed by Mary Jane Rogers, and a mortgage securing them executed by her and her husband, Newton Rogers.

[Minor points omitted.]

Mary J. Rogers alleges in her separate answer that at the time she executed the notes and mortgage she was a married woman and the owner of the property mortgaged; that she executed the notes and mortgage as surety for her husband, and for no other consideration.

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The appellee replied to this answer in six paragraphs. To the third, fourth, fifth and sixth paragraphs of this reply the appellants demurred; the demurrers were not however addressed to each paragraph of the reply, but to all the paragraphs collectively. If any one of these paragraphs was good there was no error in overruling the demurrer.

We think that some of the paragraphs were good. The facts pleaded show that the appellee was informed by Mrs. Rogers that the money she sought to obtain was for her own benefit; that she was not undertaking as the surety of her husband; that the appellee believed her statements, and relying on their truth, loaned her the money she desired; and they show also that the appellee rightfully relied on her representations. Our decisions establish the rule that a married woman may estop herself by her conduct from denying that a loan effected by her was for her benefit. As said in *Orr v. White*, 106 Ind. 341, "She may now be bound by an estoppel *in pais*, like any other person." This has been expressly ruled in other cases. *Vogel v. Leichner*, 102 Ind. 55; *Cupp v. Campbell*, 103 Ind. 213; *Ward v. Berkshire Life Ins. Co.*, 108 Ind. 301.

In the case last cited, the facts were very similar to those pleaded in the reply before us, and after a full discussion of the question, it was held that the married woman was estopped to deny that the money was obtained for her own benefit. We did not hold in that case that the form or recitals of the contract will work an estoppel, nor do we so hold in this. What we do hold is, that by her conduct and representations, relied upon by one who contracted with her in good faith, she is estopped to deny the character of her contract. If the party with whom she contracts does not act in good faith, or if he knows or has the means of ascertaining the truth, he cannot successfully insist upon an estoppel. But the presumption is against bad faith, and until the contrary appears, that presumption must prevail.

We think that we were right in holding that where it appears that the disability of coverture exists, it devolves upon the party seeking the judgment to show that the contract was one which the married woman had capacity to make. *Vogel v. Leichner*, *supra*; *Cupp v. Campbell*, *supra*. But this does not prevent the party from showing that he relied upon the conduct of the married woman. It would be a fraud which she will not be allowed to perpetrate for her to repudiate her representations as against one who

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has in good faith relied upon them. Our decisions all recognize the rule, that under the provisions of the act of 1881, a married woman may be estopped, and that when she attempts to deny what she has previously affirmed she is guilty of a legal fraud. Upon the admitted facts stated in the reply, the appellant, Mary J. Rogers, was estopped to deny the character of the contract into which she entered.

There was no error in refusing a jury trial. The suit was of equitable cognizance and the whole issue became one for the chancellor and not for the jury. This we regard as firmly settled. *Carmichael v. Adams*, 91 Ind. 526; *Field v. Holzman*, 93 Ind. 205; *Quarl v. Abbott*, 102 Ind. 233, 239; s. c., 52 Am. Rep. 662; *Brown v. Russell*, 105 Ind. 46, and cases cited.

It is contended that the judgment should be reversed because the bill of exceptions does not show that any evidence was given, but does show that testimony was offered. The appellants take a very erroneous view of the subject. Upon them rests the burden of showing error in the record, and if all the evidence was necessary to show this, it was for them to bring it into the record. If the evidence is not all in the record, the presumption that the trial court did right will prevail. If the bill of exceptions is defective the appellants must suffer and not the appellee.

Judgment affirmed.

KLINE V. NATIONAL BENEFIT ASSOCIATION.

(111 Ind. 468.)

Insurance — incontestable save for fraud — estoppel to deny receipt of premium.

A policy of life insurance provided that it should be incontestable except for fraud, and expressly admitted the payment of the premium. The premium was not paid, but the insured gave orders therefor on his employer, who at his request refused to pay them. The orders stipulated that if they were not paid the insured's rights should be forfeited. *Held*, that as against the beneficiary the company was estopped to deny the payment of the premium. (*See note*, p. 706.)

ACTION on a policy of life insurance. The opinion states the case. The defendant had judgment below.

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N. Morris, L. Newberger and J. B. Curtis, for appellant.

J. Buchanan, for appellee.

ELLIOTT, C. J. The policy of insurance on which this action is based contains, among others, this provision: "This certificate shall be incontestable for any cause except fraud or misrepresentation in the application or proofs of loss, or failure to report to the association any change of occupation that would make the risk a more hazardous one, or failure to comply with the conditions above specified." The policy also recites that an admission fee of \$8 has been paid, and that six advance assessments, amounting to \$9.60, have been paid to the association.

In the application is written: "I hereby agree to pay on becoming a member the following:

Admission fee.....	\$8 00
Dues.....	
Assessments of \$1.60 each	9 60
Total	<u>\$17 60</u>

"I have received for the above, binding receipt No. 6337.

"N. B.—If the number of a binding receipt is inserted, it becomes conclusive evidence that the above amount has been paid; if no number of a binding receipt is inserted, the payment is to be made upon the delivery of the certificate."

The number of the binding receipt, as it is called, was inserted in the policy. The assured did not make full payment in money, but as payment of part of the consideration of the contract, gave two orders, reading substantially as follows:

"\$5.60.

INDIANAPOLIS, July 24, 1882.

"Please pay the National Benefit Association, 66 East Market street, Indianapolis, Ind., five $\frac{560}{1000}$ dollars out of my wages for the month of August, 1882, to be applied as follows: Admission fee, \$4; expense fee and assessments, \$1.60. If this order is not paid, then all my rights in said association are thereby forfeited. I hereby authorize said association to deduct from moneys due on account of injuries any indebtedness there may be against my certificate.

(Signed)

"NICK KLINE."

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Payment of these orders was refused because Kline notified the railroad company upon whom they were drawn not to pay them. The policy was taken out for the benefit of the appellant, the mother of the assured, and the assured was accidentally killed within one hundred days after the policy was issued.

There was no error in admitting both of the orders in evidence, although only one was pleaded in the appellee's answer. This is so because the general denial pleaded enabled the appellee to give evidence contradicting that of the appellant upon the question whether or not the assured had performed the conditions of the contract on his part. *National Benefit Ass'n v. Bowman*, 110 Ind. 355.

The language of the application and of the policy, declaring that the policy shall be incontestable except for fraud, is unusually strong and clear. It is declared that if a binding receipt is issued, and its number inserted in the policy, the policy "shall be incontestable." It seems clear, that having made this express and strong statement, the association cannot be allowed to affirm as against the beneficiary, however it may be as to the assured, that the conditions precedent to the validity of the policy were not performed.

The case of *Wood v. Dwarrie*, 11 Exch. 493, is a much stronger one in favor of the insurer than the present. In that case the policy itself contained an express stipulation that if any untrue statements were made it should be void; but in a prospectus issued by the company it was provided that all policies should be indisputable except in case of fraud, and it was held, that notwithstanding the provision in the policy, the insurer could only avoid the policy for fraud. In the course of the opinion delivered in that case, Baron ALDERSON said: "When the plaintiff went to their office, the defendants professed to grant him an assurance on those terms; therefore they cannot now set up as a defense that the statement in the proposal was untrue, unless they add that it was fraudulently untrue, for they have, in fact, said they will never make any other defense." This case was approved in *Wright v. Mutual Benefit Ass'n*, 43 Hun, 61; 35 Alb. L. J. 323.

In *Wheelton v. Hardisty*, 8 Ellis & B. 232 (276), it was said by Lord CAMPBELL: "According to the case of *Wood v. Dwarrie*, 11 Exch. 493, the equitable replication would be sufficient without the special fraud thus imputable to the fourth plea; and we ought to be bound by that decision, even if we doubted the propriety of it; but I must say that I heartily concur in it." There are other cases

which recognize the general principle which applies here. *Wontner v. Shairp*, 4 Man., G. & S. 404; *Watson v. Earl of Charlemont*, 12 Q. B. 856; *Horwitz v. Equitable Ins. Co.*, 40 Mo. 557; *Steele v. St. Louis M. L. Ins. Co.*, 3 Mo. App. 207.

Whether the assured could have availed himself of the benefit of that part of the policy which stipulates for the payment to him of weekly benefits, in case of an accidental injury, we need not decide, for here the claim is made by the beneficiary to whom the association agreed to pay \$1,000 in the event of the death of the assured. The beneficiary took an immediate interest in the policy, and her rights could not be impaired by any act of the assured performed subsequent to the execution of the policy, for the contract is that of an ordinary insurance company, and not that of a benevolent organization. *Supreme Lodge, etc., v. Schmidt*, 98 Ind. 374; *Damron v. Penn. M. L. Ins. Co.*, 99 Ind. 478; *Harley v. Heist*, 86 Ind. 196; s. c., 44 Am. Rep. 285; *Wilburn v. Wilburn*, 83 Ind. 55; *Pence v. Makepeace*, 65 Ind. 345.

The act of Kline in securing a refusal to pay the orders might perhaps have precluded him from recovering under the policy, but it cannot prejudice the rights of the appellant. The case therefore is not affected by the wrongful act of the assured in securing the refusal to pay his orders, but it is to be determined upon the legal effect of the original contract between the insurer and the assured.

There is a valid reason for making a distinction between the rights of the assured and the beneficiary in such a case as the present. Here, the application indorsed on the policy provides that the "binding receipt," when its number is inserted in the policy, "shall be conclusive evidence that the above amount has been paid," and the policy itself declares that it shall be incontestable except for fraud; and when these instruments are placed in the hands of the beneficiary, as in this case, the insurer ought, on plain principles of justice, to be estopped to assert that the premium due under the provisions of the policy had not been paid. It is difficult to perceive how stronger representations could be made, and to permit the insurer to avoid them would in many cases be unjust, for it might well be that the beneficiary, if not misled, would pay the premium. Some of the authorities go so far as to hold, that upon grounds of public policy, an insurance company

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will be held estopped to deny, as against its acknowledgment, that the consideration for the policy has been paid. *Teutonia Life Ins. Co. v. Anderson*, 77 Ill. 384.

It is held by many courts, including our own, that where a promissory note is taken in payment of the premium, the failure to pay the note will not forfeit the policy although it is so stipulated in the note. *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Northwestern M. L. Ins. Co. v. Little*, 56 Ind. 504; *Hull v. Northwestern M. L. Ins. Co.*, 39 Wis. 397; *Phoenix Ins. Co. v. Doster*, 106 U. S. 30; *Insurance Co. v. Dutcher*, 95 U. S. 269; *Ohde v. Northwestern Life Ins. Co.*, 40 Iowa, 357; *Insurance Co. v. Bonner*, 36 Ohio St. 45.

In the case of the *National Benefit Ass'n v. Jackson*, 114 Ill. 533, it was held, in an action upon a policy like the one before us, that the order was a payment of the premium, although the insurer was unable to collect it.

Our conclusion is that the appellee is estopped, as against the beneficiary, to aver that the sums mentioned in the binding receipt and acknowledged in the policy to have been paid were not paid.

But if it were granted that there was no estoppel, we think the judgment must be reversed, because the contract does not entitle the appellee to declare a forfeiture for non-payment of the orders received from the assured. Taking into consideration the whole contract, as evidenced by all the written instruments, there was no cause for forfeiting the policy. The only clause which professes to give a right to declare a forfeiture is the brief clause contained in the orders given by the assured, and this cannot be allowed to prevail against the statements in the application, the acknowledgment in the policy, the provision that it shall be incontestable except for fraud, and the recitals in the binding receipt. The clause in the order which reads thus: "I hereby authorize said association to deduct from moneys due on account of injuries any indebtedness there may be against my certificate," is inconsistent with the theory that the existence of an indebtedness forfeited the policy. At all events, there are no such strong and clear words as require the courts to adjudge that the insurer had a right to declare the policy forfeited. *Northwestern M. L. Ins. Co. v. Hazelett*, 105 Ind. 212; s. c., 55 Am. Rep. 192; *Franklin Life Ins. Co. v. Wallace*, 93 Ind. 7; *Northwestern M. L. Ins. Co. v. Little*, 56 Ind. 504.

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The judgment is reversed, with instructions to award the appellant a new trial, and for further proceedings in accordance with this opinion.

Petition for a rehearing overruled.

NOTE BY THE REPORTER.—In *Wright v. Mut. Ben. Life Ass'n*, 43 Hun, 61, cited in the principal case, it was held that a stipulation in a life insurance policy not to question the validity of the policy after the death of the insured, is not against public policy, and is valid. The court say: "The remaining question is whether the provision so construed contravenes any rule of public policy, and is for that reason void. The stipulation provides that the validity of the policy shall not be questioned after the death of the insured, and not after two years from the date of its issue. An action for the recovery of the sum insured not being maintainable until after the death of the insured, one effect of the stipulation, if valid, is to prevent the insurer from interposing as a defense the falsity of the representations of the insured. But its effect is not to prevent the insurer from annulling the contract upon the ground of the fraudulent representations of the insured, provided an action for that purpose is brought in the life-time of the insured, and within two years from the date of the policy. The practical and intended effect of the stipulation is, as held by the trial court, to create a short statute of limitations in favor of the insured, within which limited period the insurer must test, if ever, the validity of the policy. It is settled that a stipulation in a policy limiting the time within which an action may be brought thereon is not against public policy, and that an action begun after the lapse of the stipulated time cannot be maintained. *Bipley v. Aetna Ins. Co.*, 30 N. Y. 136; *Roach v. N. Y. & Erie Ins. Co.*, 30 N. Y. 546; *Mayor v. Hamilton Ins. Co.*, 39 N. Y. 45; *Wilkinson v. First Nat. Fire Ins. Co.*, 72 N. Y. 499; s. c., 28 Am. Rep. 166; *Riddlebarger v. Hartford Ins. Co.*, 7 Wall. 386. If a stipulation shortening the period within which the statute permits the insured to enforce his rights in the courts is not against public policy, it is difficult to see upon what ground a stipulation shortening the time which the statute and the rules of the common law give an insurer to enforce its rights in the courts, can be held to contravene public policy. In *Wood v. Duarris*, 11 Exch. 493, an action on a life policy was defended on the ground that it was issued upon the express condition that if any statement in the application was untrue, the policy should be void, and that certain statements were untrue. The plaintiff replied that the defendant issued a prospectus, which came to the knowledge of the insured, stating that all policies were indisputable, except in cases of fraud. The defendant rejoined that the policy and the application formed the contract, and that the statement in the prospectus was not binding; but the court held the rejoinder bad, and the stipulation binding. The stipulation in that case did not, like the one at bar, cut off a defense based upon the fraudulent representations of the insured, but in another respect it was broader than the stipulation under consideration, because it absolutely cut off the insurer's right to litigate the validity of the policy because of the untruth of the representations, no time being given to the insurer in which to contest upon the ground that the representations were

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untrue. A stipulation like the one under consideration ought to be an incentive for the insurer to exercise vigilance and good faith in investigating the truth or falsity of the representations upon which the policy is issued while the matter is fresh. The witnesses are all alive, and the exact truth can, if ever, be ascertained, and the stipulation prevents the insurer from lying by and receiving the premiums during the life of the insured, and after his death," when the witnesses may be dead or absent, repudiating the policy.

FERTICH V. MICHENER.

(111 Ind. 473.)

Schools — regulations — reasonableness.

A school regulation that the doors shall be locked and no scholars admitted during the opening exercises of the morning session, a period of fifteen minutes, is reasonable, but due regard must be had to the weather, and the age, health and comfort of the excluded pupils.

The detention of scholars for a short time after the close of sessions, for fault or misconduct, is reasonable, and even if exercised mistakenly, it does not amount to false imprisonment unless malicious.

ACTION for personal injuries. The opinion states the case. The plaintiff prevailed below.

D. L. Wilson, J. B. McFadden and L. F. Wilson, for appellant.

B. F. Love, O. J. Glessner, E. K. Adams, L. J. Hackney, H. C. Morrison and N. B. Berryman, for appellee.

NIBLACK, J. This was an action by Nora S. Michener, a minor child, acting through Louis T. Michener, her father and next friend, against William H. Fertich for alleged injuries received while attending a public school of which Fertich was the superintendent.

The complaint was in three paragraphs. The first charged that the plaintiff, during the school year commencing in September, 1884, was a resident of the city of Shelbyville in this State, and was a pupil at one of the public schools of that city; that on the morning of the 22d day of January, 1885, which was an extremely cold day, the plaintiff, during school hours, repaired to the room in the public school building in which she was accustomed to receive, and

for the purpose of receiving instruction from her teacher; that she found the doors of her school-room locked, by reason of which she was unable to gain admittance, and was compelled to return to her home through snow and cold, which resulted in her having both of her feet frozen, and being thereby permanently injured, to her great damage; that she was so excluded from her school-room by order of the defendant, and that her injuries were not in any respect caused by any fault or negligence on her part.

The second paragraph charged the defendant with having on the 15th day of January, 1885, wrongfully and unlawfully restrained the plaintiff of her liberty for a period of thirty minutes.

The third paragraph charged, that on the 15th day of October, 1884, a certain rule for the government of the public school which the plaintiff was attending, as in the first paragraph stated, was in force and was in the following words: "When pupils respectfully ask permission to leave their room they must be permitted to do so;" that on that day the plaintiff, having a pressing necessity to do so, respectfully asked permission to leave her room, but that her teacher, acting under the order of the defendant, refused such permission, by reason of which she, the plaintiff, was subjected to great suffering and annoyance, and to consequences both repulsive and humiliating, and to her great damage.

The defendant answered:

First. That the hall in the school-building leading to the plaintiff's school-room, and where she entered the building and remained until leaving for home, was, on the morning complained of, comfortably warmed by a furnace immediately under it; that the daily sessions of the school were from 8:45 A. M. until 11:45 A. M., and from 1:15 P. M. until 4:15 P. M., which times had been fixed and notice thereof published by the board of school trustees of the city of Shelbyville, and of which the plaintiff had been fully informed; that prior to the commission of the alleged grievances stated in the first paragraph of the complaint, the plaintiff had been instructed by her teacher that if she came to school after 8:45 A. M. and before 9 o'clock A. M., she should remain in the hall of the school-building, or go into the office of the principal of the school, in the same building, and remain there until the conclusion of the morning exercises, which last from ten to fifteen minutes, and which at no time extend beyond 9 o'clock A. M.; that the plaintiff, on the morning of the day named in said first paragraph of the complaint, came

to the school-building after the morning exercises had begun, and finding that she was not in time for such exercises, remained in the hall, which was then comfortably warm, for a period of seven minutes, when she left for home of her own accord, and without the knowledge or consent either of her teacher or of the defendant, thereby unnecessarily exposing herself to the snow and cold; that at no time during that morning was the defendant nearer than a distance of a half mile from said school-building; that if the plaintiff received any injury on the morning in question it was by reason of her own fault and negligence, and not on account of any act or omission of the defendant.

Secondly. Repeating the substantial facts set up in the first paragraph, but in a different and more condensed form.

Thirdly. That as to the charge contained in the second paragraph of the complaint, the plaintiff was never kept or detained in the school-building, to which reference has been made, later than 4:15 p. m., the time fixed by the school trustees for the closing of the daily sessions of the school.

Fourthly. In general denial.

Issues were formed upon the first, second and third paragraphs of the answer by a reply in denial. A trial resulted in a verdict for the plaintiff and in a judgment on the verdict.

This action was avowedly commenced, and this appeal is seemingly prosecuted, more for the purpose of settling some general principles concerning the management of our public schools than on account of the amount of damages actually involved in the controversy.

It was shown by the evidence that the school trustees of the city of Shelbyville, in May, 1884, appointed Fertich, the appellant, superintendent of the public schools of that city for the ensuing school year, and that he was, in connection with his duties as such superintendent, to perform some services as a teacher in the city high school, if required to do so; also that such trustees had already adopted and promulgated a system of rules for the government of the public schools of the city, nearly all of which were read in evidence.

One of these rules prescribed the time to be occupied by the daily sessions of the schools, which was in substance as stated in the first paragraph of the answer. Another declared the right of every pupil to retire from the school-room when permission was re-

spectfully asked, as set out in the third paragraph of the complaint. Others pertained to the duties of teachers, and still others had reference to the powers and duties of the superintendent.

The first of this latter class of rules was as follows:

"The superintendent shall have the supervision of all the schools and the general care of all school property, and act under the advice and direction of the board of trustees."

The second declared that "he" (the superintendent) "shall be especially charged with the enforcement of the rules of the board, and be held responsible for the general management and discipline of the school."

The third required the superintendent to visit weekly all the departments of the schools under his charge, and to see that the best methods of instruction were adopted.

The fourth required the superintendent to appoint meetings of teachers as often as necessary to secure uniformity of teaching and discipline, and to report to the trustees when a teacher should be found to be deficient and incompetent.

It was further made to appear that it was, and had previously been, the custom in the school which the appellee had been attending, to devote the first fifteen minutes after meeting in the morning to what was termed the opening or morning exercises, which consisted of prayers, chants, singing, reading, recitations, invocations and impressive short lessons, varied from time to time in the discretion of those in the immediate charge of the school; that on the morning of the 22d day of January, 1885, the temperature of the atmosphere stood at about 18° below zero, and that on that morning the appellee did not reach the school-building until after the opening exercises had begun; that she found both of the doors leading to her school-room from the hall of the building locked; that she tried both doors and could not gain admission; that the janitor of the building invited her to approach the register in the hall, which was apparently in reasonably well-heated condition, and warm herself, but that she declined under the belief that she was not allowed to stand by the register without first obtaining the consent of her teacher; that she had forgotten, if she ever knew, that she had the right to go into the principal's office and to remain there until the opening exercises were over; that she, after remaining in the hall six or seven minutes, and finding that her feet were becoming quite numb and cold, left the building and re-

turned home; that on her way home her feet became frost-bitten or frozen; that in consequence she became lame and disabled, and suffered great pain at times thereafter.

It was still further shown to have been the policy of the appellee's teacher to discourage the pupils, so far as practicable, from retiring from the room during school hours, and that the appellant had concurred in that general policy, but there was no evidence tending to show that he had ever instructed the appellee's teacher not to permit her, or any one else, to retire when permission was properly asked; that the class to which appellee belonged was usually dismissed as early as fifteen minutes past three o'clock in the afternoon; that the appellee, in common with other pupils, was sometimes detained, or kept in, as it was usually termed, for ten or fifteen minutes after the class was dismissed, and required to further study her lessons during that additional time; that the appellee usually had the impression, when she was kept in, that it was as a penalty for having retired from the room during the day, but as to the extent to which she was justified, if at all, in receiving such an impression, the evidence was conflicting; that some time in October, 1884, the appellee asked permission to retire from her school-room, but that permission was refused upon the ground that the school would close for the day in ten or fifteen minutes; that in consequence of such refusal, the appellee suffered annoyance and inconvenience and was subjected to shame and humiliation on her way home, she having an infirmity which required her frequent retirement.

It was also an admitted fact, that soon after the commencement of the school year of 1884 and 1885, the appellant directed the teachers under his charge to instruct their pupils that when anyone of them should be tardy, that is, should not arrive at the school building until after the opening exercises for the day had begun, he or she should remain either in the hall, or in the principal's office, until such exercises were over, and that the instructions so to be given were to constitute a rule to be observed in the schools of the city; and the evidence tended to show that the appellee's teacher had to some extent, and at least in a general way, instructed her pupils as directed.

One of the teachers testified that when the appellant directed his teachers as stated, he assigned as a reason for ordering the promulgation of such a rule, that the character of the opening exercises

was such that the coming in of pupils during their progress seriously disturbed them, and that in answer to an inquiry as to how such a rule could be effectively enforced, he said that if he were a teacher he would not hesitate to lock the doors of his room if necessary; and the evidence further tended to show that the appellee's teacher was in the habit of causing the doors of her room to be locked while the opening exercises were being holden.

The appellant in his testimony admitted that he had on one occasion, not specifically described, directed the doors of the school-rooms to be locked, but denied that he had given any such direction at the time the appellee was locked out, or that he had ever given any general direction that the doors should be locked during the opening exercises, and there was no evidence tending to prove that he had ever actually given any such general direction.

It was further made to appear that on the morning during which the appellee had her feet frozen, the appellant was not at or immediately near the building which the former attended, and that the latter was only occasionally at that building.

The court gave to the jury an elaborate and what seems to have been a carefully prepared series of instructions.

The sixth of the series was as follows: "What a reasonable rule is, is a question of law, and I do not hesitate to declare a rule that would bar the doors of a school-house against a little girl ten years of age, who had come one-fourth of a mile to school of a cold winter morning, when the earth was covered with snow, and the thermometer registering 18° below zero, exposing her to the cold, or excluding her from the fire, for no other reason than that she was a few minutes tardy, is unreasonable, and in its practical operation little less than wanton cruelty, and therefore unlawful, and cannot justify the conduct of any teacher who enforces it, immaterial by what school authority enacted or directed."

The eighth instruction told the jury that "A rule or regulation made by a teacher, requiring pupils who are tardy to remain in the hall of the building, outside of the school-room, during the opening religious, sacred or singing exercises, to avoid interruption or confusion incident to their entry at such a time, for the space of fifteen minutes, is a reasonable rule and lawful, provided the hall is comfortable, and provided the hall is prepared to accommodate the needs and comforts of the pupils, and the doors may be closed and locked during this fifteen minutes if necessary to enforce observ-

ance of the rule; but if the hall is cold and uncomfortable the rule is not a reasonable one, and should not be enforced."

When a corporation is duly erected or established, the law tacitly annexes to it the power of making suitable rules, regulations, by-laws, or ordinances for its own government and for the government of those over whom it may have jurisdiction or control. While this power of making such rules, regulations, by-laws or ordinances, as the case may be, is usually conferred in direct terms by the act of incorporation, it is nevertheless incidental to every corporation, whether municipal or private. 1 Bl. Com. 476; 1 Dill. Mun. Corp. (3d ed.), § 308 and notes.

All by-laws and ordinances and rules and regulations of the same general nature must be suitably adapted to the purposes for which the corporation was organized, and cannot be either inconsistent with the general law or the act of incorporation, or unreasonable or oppressive. Whether a by-law, or other kindred regulation, is reasonable or valid, is a question of law for the decision of the court, and hence not a question of fact for the determination of the jury. Dill. Mun. Corp. *supra*, § 327; *Green v. City of Indianapolis*, 22 Ind. 192; *State v. White*, 82 Ind. 278; s. c., 42 Am. Rep. 496; *Angell & Ames Corp.*, § 357; 1 *Morawetz Private Corp.*, § 497.

Section 4438, R. S. 1881, which has been in force since March 6, 1865, declares each civil township and every incorporated town and city of the State to be a distinct municipal corporation for school purposes.

The next succeeding section requires the common council of each city, and the board of trustees of each incorporated town, respectively, to elect and keep in office three school trustees, who constitute the school board of such city or town.

Section 4444, which has reference to township trustees as well as the trustees of cities and towns, provides that such trustees shall have charge of the educational affairs of their respective townships, towns and cities, and shall employ teachers and locate and establish a sufficient and convenient number of schools for the education of the children within their respective jurisdictions.

Section 4445 authorizes the school trustees of such incorporated towns and cities to employ a superintendent for their schools, "and to prescribe his duties, and to direct in the discharge of the same."

Construing these general statutory provisions in connection with the incidental powers of corporations to which we have referred, this court has frequently, either expressly or impliedly, held that the various school boards and other educational authorities of the State have the power to adopt appropriate rules and regulations for the government of the schools under their control, and that when so adopted such rules and regulations are analogous to by-laws and ordinances, and are tested by the same general principles. *Danenhoffer v. State*, 69 Ind. 295; s. c., 35 Am. Rep. 216; *State v. White*, *supra*; *State v. Webber*, 108 Ind. 31; s. c., 58 Am. Rep. 30.

The accepted doctrine is, that the general power to take charge of the educational affairs of a district or prescribed territory includes the power to make all reasonable rules and regulations for the discipline, government and management of the schools within the district or territory. *Thompson v. Beaver*, 63 Ill. 353; *Roberts v. City of Boston*, 5 Cush. 198; *Sherman v. Charlestown*, 8 Cush. 160; *People v. Medical Society*, 24 Barb. 570; *Spiller v. Woburn*, 12 Allen, 127; *Hodgkins v. Rockport*, 105 Mass. 475; *State v. Burton*, 45 Wis. 450; s. c., 30 Am. Rep. 706; *Ferriter v. Tyler*, 48 Vt. 444; s. c., 21 Am. Rep. 133.

But this does not imply that all the rules, orders and regulations for the discipline, government and management of the schools shall be made a matter of record by the school board, or that every act, order or direction affecting the conduct of such schools shall be authorized or confirmed by a formal vote. No system of rules however carefully prepared can provide for every emergency, or meet every requirement. In consequence, much must necessarily be left to the individual members of the school boards, and to the superintendents of, and the teachers in the several schools. *Russell v. Lynnfield*, 116 Mass. 365.

It follows that any reasonable rule adopted by a superintendent, or a teacher merely, not inconsistent with some statute or some other rule prescribed by higher authority, is binding upon the pupils.

In the present case, the rule requiring the appellant to visit weekly all the schools under his charge and to see that the best methods of instruction were adopted, and which was read in evidence, necessarily conferred upon him authority, if authority had otherwise been wanting, to order and promulgate such additional rules as the best interests of the schools might seem to require, within the limits to which all such rules may extend.

As applicable to the structure and situation of the school-building which the appellee attended, and to the purposes designed to be accomplished by it, the rule requiring tardy pupils to remain either in the hall or in the principal's office until the opening exercises were over, was a reasonable rule, and one to which, as an abstract regulation, no serious objection can be urged.

Tardiness is a recognized offense against the good order and proper management of all schools. *Burdick v. Babcock*, 31 Iowa, 562. A tardy pupil ought not therefore to complain of some inconvenience or annoyance at having to remain in some other part of the building for the short period of time required to complete the opening exercises. But the manner of enforcing such a rule may, as in this case, cause a very different question to be presented. 2 Dill. Mun. Corp., § 950.

In the enforcement of all rules for the government of a school, due regard must be had to the health, comfort, age and mental as well as physical condition of the pupils, and to the circumstances attending each particular emergency.

More care ought to be observed in looking after the comfort of pupils, and especially those of tender age, in extremely cold weather than when the atmosphere is nearer a mean temperature. Pupils, known to have some mental or physical infirmity, may require some relaxation in the strict enforcement of such rules as against them.

No rule, however reasonable it may be in its general application, ought to be enforced when to enforce it will inflict actual and unnecessary suffering upon a pupil. Rules are often adopted inflicting a penalty for absence from school without proper or some prescribed leave, and rules of that class have always, so far as our information extends, been held to be reasonable and sometimes necessary school regulations, and yet such rules could not be lawfully enforced against a pupil detained from school by sickness, a violent storm, a death in the family, or any physical disability to attend.

A school regulation must therefore be not only reasonable in itself, but its enforcement must also be reasonable in the light of existing circumstances. The habit of locking the doors of the school-room during the opening exercises observed by the appellee's teacher was not an unreasonable enforcement of the rule under consideration, in moderate weather and under ordinary circumstances.

But to lock the doors on an extremely and unusually cold morning, without causing special care and attention to be given to the comfort of such pupils as might thereby be required to remain in some other part of the building, was undoubtedly both an unreasonable and a negligent and hence an improper enforcement of the rule.

With these general principles in view, neither one of the instructions hereinabove set out can be sustained. They both utterly confounded the reasonableness of the rule to which they evidently referred as an abstract and general regulation, with its improper and unreasonable enforcement, and in effect submitted to the jury the reasonableness of the rule as a hypothetical question, dependent upon the existence or non-existence of certain enumerated facts. In other words, they both made the question of the validity of the rule one of mixed law and fact to be determined by the jury, instead of a question of law, as it really was, for the decision of the court.

The court also instructed the jury to the effect that if the appellee was at any time detained in the school-room for a period of ten or fifteen minutes after her class was dismissed, as a penalty for having asked leave to retire and having retired from the room during school hours, such detention was a false imprisonment, and that a teacher who might refuse to permit a pupil to retire from the school-room, in accordance with the rule set out in the third paragraph of the complaint, would be liable for whatever damages thereby resulted to the pupil.

In our view of the principles underlying this case, that instruction was also erroneous. Such a detention after the rest of the class was dismissed may have been unjust, in the particular instance, as well as in a general sense, to the appellee, and it, as well as the refusal of permission to retire, may have been a violation of the spirit of the rule referred to; but upon the hypothesis stated in the instruction, the detention did not amount to a false imprisonment, and the refusal of permission to retire did not constitute a cause of action against the teacher.

The recognized doctrine now is, that a school officer is not personally liable for a mere mistake of judgment in the government of his school. To make him so liable it must be shown that he acted in the matter complained of wantonly, willfully or maliciously. *Cooper v. McJunkin*, 4 Ind. 290; *Gardner v. Slate*, 4 Ind. 632; *Danenhoffer v. State*, 79 Ind. 75; *Elmore v. Overton*, 104 Ind. 548;

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s. c., 54 Am. Rep. 343; *Churchill v. Fewkes*, 13 Bradw. 520; *McCormick v. Burt*, 95 Ill. 263; s. c., 35 Am. Rep. 163; *Harman v. Tappenden*, 1 East, 555; *Dritt v. Snodgrass*, 66 Mo. 286; s. c., 27 Am. Rep. 343.

The instruction consequently fell short of telling the jury all that was necessary to establish a liability for either the detention or the refusal referred to by it.

The detention or keeping in of pupils for a short time after the rest of the class has been dismissed, or the school has closed, as a penalty for some misconduct, shortcoming or mere omission, has been very generally adopted by the schools, especially those of the lower grade, and it is now one of the recognized methods of enforcing discipline and promoting the progress of the pupils in the common schools of the State. It is a mild and non-aggressive method of imposing a penalty, and inflicts no disgrace upon the pupil. The additional time thus spent in studying his lessons presumably inures to the benefit of the pupil. However mistaken a teacher may be as to the justice or propriety of imposing such a penalty at any particular time, it has none of the elements of false imprisonment about it, unless imposed from wanton, willful or malicious motives. In the absence of such motives, such a mistake amounts only to an error of judgment in an attempt to enforce discipline in the school, for which, as has been stated, an action will not lie. And in this connection it is perhaps proper to say that there is nothing in the evidence, as we construe it, tending to show that the appellee's teacher was actuated by wantonness, wilfulness or malice in any of the alleged wrongs of which the appellee has complained. As there was a failure of proof as against the teacher, the necessary inference is that the evidence was insufficient to establish a cause of action against the appellant. As to what constitutes a reasonable rule for the government of a school, see the case of *Burdick v. Babcock*, 31 Iowa, 562, above cited.

The judgment is reversed, with costs.

Petition for a rehearing overruled.

STATE V. THOMAS.

(111 Ind. 515.)

Witness — order of exclusion — disobedience — effect on party.

Where the court ordered the witnesses to be excluded, a party may not be deprived of the testimony of one who was present throughout the trial, where it was not known to the party or to him that he was to be a witness, and his presence had not been procured by the party or his counsel.

THE opinion states the case.

C. A. Korbly and W. O. Ford, for appellant.

E. G. Leland and S. E. Leland, for appellee.

ELLIOTT, J. The principal question in this case is thus presented by the record: "The plaintiff called William Johnson, a competent witness of full age, to the stand, who was thereupon duly sworn by the clerk. Thereupon the defendant asked the witness the following preliminary question: 'Were you present in the court-room during the examination of the witnesses, and did you hear their testimony?' and the witness answered, 'yes, but I did not know I was to be a witness.' The defendant thereupon objected to the examination of said witness on the following grounds: Because the court, at the commencement of the trial, ordered a separation of the witnesses on both sides, and sent them out of the room, and this witness was present and heard the evidence. Thereupon the plaintiff, by C. A. Korbly, stated to the court that the plaintiff did not know that said William Johnson was or would be a witness in the cause, or that he knew any thing of the facts which the plaintiff would now propose to prove, until after the preceding witness, William Brown, had concluded his testimony, at which time he was informed by a member of the bar, not engaged in the cause, that William Johnson would be a good impeaching witness against David Francis, and that William Johnson was not present in disobedience of the order of the court."

It appears from the statement we have copied from the record that neither Johnson nor the relatrix was in fault, for it was not known to either when the order was made that he would be called as a witness.

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As it is affirmatively shown that Johnson's presence was not by the procurement or connivance of the relatrix, nor attributable to any fault or neglect on her part or that of her counsel, the trial court erred in refusing to permit him to testify. It has been expressly decided in two recent cases, that where the party is entirely free from fault, the testimony of a witness who disobeys an order of the court cannot be excluded. *Davis v. Byrd*, 94 Ind. 525; *Burk v. Andis*, 98 Ind. 59.

In the first of these cases the question was closely examined and many authorities cited. We there said: "We hold the true rule to be this: Where a party is without fault, and a witness disobeys an order directing a separation of witnesses, the party shall not be denied the right of having the witness testify, but the conduct of the witness may go to the jury upon the question of his credibility." We quoted from eminent text-writers like expressions of the rule, and cited the decisions of many courts. Our conclusion on a second examination of the question is that the English author there referred to was right in saying: "But it seems to be now settled, that the judge has no right to reject the witness on this ground, however much his willful disobedience of the order may lessen the value of his evidence." 2 Taylor Ev. 1210.

In another text-book a very thorough review of the authorities was made, and it was said: "But it may now be considered as settled, that the circumstance of a witness having remained in court is disobedience to an order of withdrawal, is not a ground for rejecting his evidence, and that it merely affords matter of observation." 2 Phill. Ev. (5th Am. ed.) 744.

Mr. Bishop, with his usual vigor, thus states the doctrine: "On the other hand, if the party was without fault, the judge has no right to punish his innocence by depriving him of his evidence, and ruin him at the will of a witness. The testimony should be admitted, subject to observation to the jury. Such is the law in principle." 1 Bish. Crim. Proc., § 1191.

[Omitting minor points.]

Judgment reversed.

AMICK v. BUTLER.

(111 Ind. 575.)

Insurance — to creditor — interest.

A debtor owing \$600 had his life insured for the benefit of his creditor in the sum of \$2,000, the creditor paying all the expenses, premiums and assessments. It was agreed that if the debtor paid the debt and the expense of the insurance, the policy should be made over to him. He died in about two years, without having paid any thing. The creditor received the amount of the insurance. *Held*, that the debtor's administrator could not recover the surplus from him. (*See note, p. 729.*)

ACTION to recover insurance money. The opinion states the case. The plaintiff had judgment below.

J. Overmyer, for appellant.

T. C. Batchelor, for appellee.

MITCHELL, J. Suit by Butler, administrator of the estate of Frazee, deceased, against Amick, to recover part of the amount which the latter received on a policy of life insurance which had been effected on the life of the plaintiff's decedent.

The facts most favorable to the plaintiff's theory are comprised in the following statement: On the 23d day of March, 1877, Decatur M. Frazee was indebted to Amick in the sum of about \$600. By agreement with Amick, Frazee made an application to the U. B. Mutual Aid Society of Pennsylvania, a mutual life insurance company, for membership in that society. Upon due examination he was admitted as a member, receiving a certificate in which Amick, his heirs and assigns, were designated as the beneficiaries, and were to become entitled upon the death of Frazee to \$2,000, upon condition that the terms and conditions of the certificate of membership should be complied with. Amick was designated in the application and in the certificate of membership as a creditor. The amount of the indebtedness was erroneously stated in the application at \$250. The proof showed that it was about \$600. All the expenses incident to the issuance of the certificate, and all the annual payments and assessments stipulated in the certificate of membership to be paid by Frazee, were to be and were paid by

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Amick. At the time the policy was issued it was orally agreed that if Frazee should at any time thereafter pay his indebtedness, and reimburse Amick for the cost of obtaining the policy and carrying the insurance, the latter would turn over the policy to the former.

On the 19th day of April, 1879, Frazee died without having paid any part of his debt, and without having paid any part of the cost of procuring and continuing in force the certificate of membership.

The society, upon due proof of the death of Frazee, paid to Amick about \$1,963, in discharge of its liability upon the certificate. After deducting the amount of the indebtedness and the sums advanced for the insurance, it was found that there remained of the sum received from the society \$1,259.58, which the administrator of Frazee had demanded from Amick. The latter having refused payment, the court gave judgment in favor of the administrator for the amount.

The propriety of the conclusion of the learned court on the foregoing facts involves all the questions in the record.

In support of the judgment so given, it is contended that the right of a creditor in the proceeds of a policy of insurance upon the life of his debtor, is limited to the amount of the debt and necessary expenses on account of which the insurance was taken out and maintained. When the debt and expenses are extinguished, the argument is, the excess belongs to the legal representative of the deceased debtor, and may be recovered from the creditor, to whom payment has been made, as money had and received to the use of the debtor's representative.

This conclusion is predicated upon the rule, the effect of which is that one having no insurable interest in the life of another may not by means of insurance speculate upon the life of the person insured. The insurable interest cannot, it is contended, exceed the amount of the debt; hence the person obtaining the insurance must account for the excess.

Upon considerations of public policy, the general rule has long prevailed that insurance taken out and obtained by one upon the life of another, in whose life the person procuring the insurance had at the time no insurable interest, is invalid. *Elkhart, etc., Ass'n v. Houghton*, 103 Ind. 286; s. c., 53 Am. Rep. 514; *Continental Life Ins. Co. v. Volger*, 89 Ind. 572; s. c., 46 Am. Rep. 185.

A policy taken upon the life of another, for speculative purposes merely, is regarded as nothing more than a wager on the life of the

person insured. Such a transaction is assigned a place in the catalogue of gambling, and is justly condemned by the law. *Russ v. Mutual Benefit, etc., Co.*, 23 N. Y. 516; *Brockway v. Mutual Benefit, etc., Co.*, 9 Fed. Rep. 249; *Bliss Life Ins.*, § 9.

No one can have the benefit of an insurance effected by himself upon the life of another, unless he has an insurable interest in the life insured.

Where money has been collected upon a policy which had its inception in a scheme of mere speculation upon the life of the person who is the subject of insurance, or where insurance is taken out by a debtor as a security for the benefit of his creditor, the expense of procuring and continuing the policy being borne by the former, the authorities justify the conclusion in either case that the amount collected, less the debt secured or the sums advanced in obtaining and keeping the policy in force, may be recovered by the personal representatives of the person insured. *Gilbert v. Moose*, 104 Penn. St. 74; s. c., 49 Am. Rep. 570; *Cammack v. Lewis*, 15 Wall. 643; *Page v. Burnstine*, 102 U. S. 664; *Warnock v. Davis*, 104 U. S. 775; *Dutton v. Willner*, 52 N. Y. 312; *Drysdale v. Piggott*, 8 DeGex, M. & G. 546; *Lea v. Hinton*, 5 DeGex, M. & G. 823.

In case the policy originates in a transaction which the law condemns, or where the debtor, having taken insurance on his own life, at his own expense, merely pledges the policy as a security for an existing debt, the holder, whether by assignment or otherwise, who receives the entire proceeds, will be regarded as a trustee of the representatives of the insured for the amount received, less the amount of his debt, or the sum advanced on the policy. *American Life, etc., Co. v. Robertshaw*, 26 Penn. St. 189; *Matthews v. Sheehan*, 69 N. Y. 585.

Thus in *Bruce v. Garden*, 5 Ch. App. 32, the language of Lord HATHERLEY is: "The court requires distinct evidence of a contract — that the creditor has agreed to effect a policy, and that the debtor has agreed to pay the premiums, and in that case the policy will be held in trust for the debtor."

The case under consideration is not within the facts, and hence is not governed by the principles which ruled the cases above mentioned.

This is a case in which a debtor, presumably at the solicitation of his creditor, effected an insurance on his own life for the benefit of his creditor, the latter being designated in the policy as the

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beneficiary, and agreeing to pay the expense of effecting the insurance and of keeping the policy in force. It was also agreed that the debtor might at any time pay the debt and reimburse the creditor for outlays in effecting and maintaining the insurance, and thereby entitle himself to an assignment of the policy. It has never been seriously questioned but that a person may insure his own life, and by the terms of the policy appoint another to receive the money, upon the event of the death of the person whose life is insured; or having taken a policy, valid in its inception, that he may in good faith assign his interest in such policy as in any other chose in action. *Hutson v. Merrifield*, 51 Ind. 24; s. c., 19 Am. Rep. 722; *Franklin Life Ins. Co. v. Sefton*, 53 Ind. 380; *Ashley v. Ashley*, 3 Sim. 149; *Mutual Life Ins. Co. v. Allen*, 138 Mass. 24; *Clark v. Allen*, 11 R. I. 439; s. c., 23 Am. Rep. 496. See also note to *Clark v. Allen*, *supra*; 17 Am. Law Reg. 86; *N. Y. Mut. Life Ins. Co. v. Armstrong*, 117 U. S. 591; *Archibald v. Mutual Life Ins. Co.*, 38 Wis. 542; *Eckel v. Renner*, 41 Ohio St. 232.

In either case the essential point is that the transaction be *bona fide*, and not merely a cover for obtaining wagering or merely speculative insurance, and a device to evade the law. *Provident, etc., Co. v. Baum*, 29 Ind. 236; *Olmsted v. Keyes*, 85 N. Y. 593; *Campbell v. New England M. L. Ins. Co.*, 98 Mass. 381; *Connecticut Mut. Life Ins. Co. v. Schaefer*, 94 U. S. 457; *Guardian M. L. Ins. Co. v. Hogan*, 80 Ill. 35; s. c., 22 Am. Rep. 180; *Murphy v. Red*, 64 Miss. 614; s. c., 58 Am. Rep. 855; *Cunningham v. Smith*, 70 Penn. St. 450.

The cases which hold invalid the taking or assignment of insurance policies turn upon the fact that in each case the transaction was found to be merely colorable, and a scheme to obtain speculative insurance. *Franklin Life Ins. Co. v. Hazzard*, 41 Ind. 116; s. c., 13 Am. Rep. 313; *Cammack v. Lewis*, *supra*; *Warnock v. Davis*, *supra*.

Where the person whose life is insured is the real contracting party, and continues to pay the premiums, it is of no consequence that the beneficiary, or appointee in the policy, has no insurable interest in the life of the insured. In such a case the policy is valid in any event, and if the beneficiary or assignee be a creditor, and holds the policy as a security merely, he will be a trustee for the excess, as is any other creditor who holds securities for a debt. In case how-

ever the party insured is only nominally the contracting party, while the beneficiary named in the policy, or the assignee, has in reality procured the insurance, and paid the premiums, then in order that the transaction may be taken out of the category of wagering contracts, the beneficiary must have had an insurable interest of a pecuniary character, or of that nature, either present or prospective, at the time the policy had its inception. A policy so taken is the property of the beneficiary, who occupies in that event no trust relation to the debtor. *Hine & Nichols Life Ins.* 75.

That a creditor has an insurable interest in the life of his debtor has never been controverted. It is universally allowable that a creditor may in good faith take insurance upon the life of his debtor, either by procuring a policy in which he is designated as the beneficiary, or by assignment. We know of no authority to the contrary of this. While this is true, the amount of the insurance obtained must bear some just proportion to the debt, or the extent of the obligation assumed by the beneficiary, and the probable contingencies attending the future maintenance of the policy. The circumstances must be such as not to raise the presumption that the transaction on its face was a mere speculation.

As was said by the learned judge in *Fox v. Penn. M. L. Ins. Co.*, 4 Big. L. & A. Ins. Rep. 438: "If a man should owe me \$10, I cannot go and insure his life to the extent of \$10,000." *Mowry v. Home Life Ins. Co.*, 9 R. I. 346.

The policy cannot however be limited to the amount of the debt. If it were otherwise the creditor would inevitably be compelled to lose whatever sums he might be required to pay in effecting the insurance and paying premiums.

The beneficiary takes the chances of all future contingencies, including the continued solvency of the company; or if it be a company in which the fund is to be accumulated by assessments upon the members, that a sufficient number will continue therein to pay the debt and reimburse him for his advances.

No general rule applicable to all cases can be laid down, except that the interest must be of a substantial character, and such as, under all the circumstances, to take from the transaction the suspicion of mere wagering. *Connecticut Mutual Life Ins. Co. v. Luchs*, 108 U. S. 498.

In the case before us the application for membership shows that the person whose life was insured was within a few months of forty-

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nine years old, and in good health. The certificate of membership required the payment of \$16 into the treasury of the society the first year, \$10 annually for the ensuing four years, and \$4 annually thereafter during the life-time of the member, besides paying into the treasury, upon the death of each member, his *pro rata* mortality assessment. In consideration of the agreement to comply with these, among other conditions, the society agreed to pay the beneficiary named, absolutely, upon the death of the member, the sum of \$2,000. In the language of the court in *Bevin v. Connecticut Mutual Life Ins. Co.*, 23 Conn. 244: "All the books hold this to be a sufficient interest to sustain a policy of insurance. * * * The policy must, we think, be held to be a valued policy." See note to *Currier v. Continental Life Ins. Co.*, 52 Am. Rep. 134. The transaction being thus relieved from any features of a merely speculative character, the policy vested an absolute right in the beneficiary named therein to collect from the society upon the death of the member the full amount stipulated to be paid, and the amount thus collected became the property of the beneficiary, unless the parol agreement to turn the policy over to the debtor upon the conditions already stated affected the creditor with an enforceable trust in favor of the personal representative. We can discover no principle upon which a trust can be maintained in the absence of any offer by the debtor in his life-time to pay the debt and reimburse the creditor for his advances. The right to the insurance vested absolutely in the beneficiary as soon as the contract of insurance was consummated. "The moment this policy was executed and delivered, it became property, and the title to it vested in some one. It will not be claimed that it vested in the person whose life was insured. It must have vested then in all or in a part of the payees." *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60.

The transaction had none of the characteristics of a mortgage. It was entirely at the option of the debtor whether or not he would reimburse the creditor for the sums expended in procuring the insurance. Whatever the creditor might have done in respect to the collection of his debt, it was beyond his power to compel the insured to reimburse him for his advances in procuring and maintaining the policy. The debtor had not agreed to repay advances voluntarily made. The advances having been made for the creditor's own benefit, he had no remedy against the debtor or his legal representative to recover them. The rule in cases involving analogous principles is that where the owner of property vests the

title absolutely in another in pursuance of an agreement which gives the grantor the option to repurchase or not, at his election, the transaction does not create a mortgage. *Voss v. Eller*, 109 Ind. 260; *Hays v. Carr*, 83 Ind. 275.

The right to the policy, and to the benefits to be derived therefrom, was absolute in the beneficiary until both the debt and the advances were paid, even conceding that the oral agreement referred to would have been enforceable in the life-time of the insured.

The beneficiary in a life policy, who has an insurable interest in the life of the insured, at the inception of the policy, may enforce payment for the full amount, notwithstanding the debtor, on whose life it runs, may have paid the debt. "Any interest sufficient to justify the insurance and relieve it of the gambling aspect, will render it valid, and such policy will continue valid in the hands of a beneficiary or assignee, regardless of the cessation of interest, provided the facts show entire good faith and a sufficient justification." *Hine & Nichols Life Insurance*, 82; *Olmstead v. Keyes*, *supra*; *Connecticut Mut. Life Ins. Co. v. Schaefer*, *supra*.

Perhaps, owing to the peculiar nature of contracts such as we are considering, if the debtor, in his life-time, had tendered the amount of the debt and the advances, the claim of the legal representative might be supported. But in the absence of an offer to comply with his agreement, we can discover no rational ground upon which the court can now compel the appellant to surrender money to which, according to every principle of law, he has a perfect title, and in which neither the debtor nor his representatives ever had any interest, legal or equitable.

A distinguishing element in the determination of cases of this character is, whether the one whose life is insured so contracts himself to pay the premiums that an action could be maintained against him by the creditor for that amount. If such a contract is shown, then the policy is to be regarded as a collateral security, and the debtor is entitled to it upon the extinguishment of the principal debt; while on the other hand, if the creditor pays the premiums, and the debtor is under no obligation to repay them, the right of the creditor is absolute. *Freese v. Brade*, 2 De Gex & J. 582; *Knox v. Turner*, L. R., 5 Ch. App. 515; *Gottlieb v. Cranch*, 4 De G., M. & G. 440; *Godsal v. Webb*, 2 Keen, 100.

As has already been seen, the debtor neither paid nor was he under any obligation to pay the premiums.

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Within all the rules therefore the appellant became the absolute owner of the policy, without any outstanding equity in the debtor or his representative, until such payment was made or tendered according to the contract.

Judgment reversed, with costs.

Petition for a rehearing overruled.

NOTE BY THE REPORTER.—Where the disproportion between the amount of a policy taken out by a creditor on the life of his debtor and the debt thereby secured is very great, as where the insurance is \$3,000 and the debt is \$100, it is the duty of the court to declare the transaction a wager as matter of law. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law. It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured, but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined. Speaking for himself, our Brother PAXSON, in *Grant's Adm'r's v. Kline*, 19 Week. Notes Cas. 260, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest, and the amount of premiums, with interest thereon, during the expectancy of the life insured, according to the Carlisle tables. This appears to be a just and practicable rule. It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but as is said in *Corson's Appeal*, 18 Penn. St. 438, 445: "In all cases there must be a reasonable ground, founded on the relations of the parties to each other, either pecuniary or by blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are therefore, independently of any statute on the subject, condemned as against public policy." But in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction. Pennsylvania Supreme Court, October 3, 1887. *Cooper v. Shaeffer*. See note, 57 Am. Rep. 479; 56 Am. Rep. 196.

A., being indebted to B., his brother-in-law, in the sum of \$743.56, insured his life for the benefit of the latter in the sum of \$3,000, B. paying all the premiums. Upon A.'s death the company paid the amount of the insurance to B., against whom the administrators of A. brought a suit to recover \$3,000, less the indebtedness and premiums paid. It appeared that A. was considered by the company a good risk, and that the transaction between A. and B. was in perfect good faith. *Held*, that the disproportion between the actual indebtedness and the sum insured did not, under the circumstances, create a presumption that this was a wagering policy, nor in the absence of positive proof, that it was intended as a collateral security merely. We approach this question with caution, the more so that this court has not yet laid down a rule upon this

Amick v. Butler.

subject. That we shall be compelled some day to do so is possible. We have said that the sum insured must not be disproportioned to the interest the holder of the policy has in the life insured. To take out a policy of \$5,000 to secure a debt of \$5 would be such a palpable wager that no court would hesitate to declare it so as a matter of law. Care must be taken also that a debt shall not be collusively contracted for the mere purpose of creating an insurable interest. Mr. Dickens, in his inimitable "Pickwick Papers," has shown how a debt may be created for the purpose of lodging the debtor in prison by collusion with the creditor. Speaking for myself, it may be that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt, with interest, and the amount of premiums, with interest thereon, during the expectancy of life as shown by the Carlisle tables. This view however has never yet been adopted by this court in any adjudicated case; nor do we feel compelled to define the disproportion now, in view of the particular facts of the case in hand. We do not regard it as either immoral or wagering for Kline to attempt to secure the sums he had already fruitlessly paid in premiums on Grant's life, and if Grant had no objection thereto, and assisted him therein, I do not see that any one could object to this but the company. Again we have the declarations of Grant that he owed Kline a considerable sum of money — the precise amount not stated; that Kline had aided him in various ways; had never refused him a favor, etc. In view of their connection by marriage, and of their admitted relations, it is at least probable that Kline had aided him at many times and in various ways pecuniarily that are not represented by any evidences of debt. And if the sum insured was regarded by Grant as a reasonable amount to indemnify Kline, with what grace can Grant's administrators come in and allege that it was not? They have no possible equity. Grant never paid \$1 of the premium, and if they are allowed now to recover, it is not by virtue of any equity, but by force of an inexorable rule of public policy, which treats it as a wagering policy, and declares the policy-holder a trustee for the person insured as to the entire proceeds, save only the money actually loaned, with the premiums paid. Assuming then that Kline might, with Grant's consent and as against his administrators, lawfully seek to indemnify himself for the premiums paid and lost, we have the sum of \$743.56 as the amount which Kline was out of pocket. We do not know what Grant's expectation of life was when the policy was taken out, and there is nothing before us upon which we could base any reliable opinion. But it appears he was sixty-five years of age, and was an unusually good risk. While we do not know what the amount of the annual premium was, we do know that it must have been a considerable sum on \$3,000 for a man of sixty-five years, and with the annual interest would roll up rapidly. That Grant died within a year is not to the purpose; he might have lived long enough for the debt and premiums and compound interest to have exceeded the amount of the policy. Surely in such case we cannot say as a matter of law that the disproportion was so great as to make it a wagering policy. Tennessee Supreme Court, April 11, 1887. *Grant v. Kline.*

CASES
IN THE
SUPREME COURT
OF
ALABAMA.

MULLENS V. STATE.

(33 Ala. 42.)

Criminal law — statute — abusive language near dwelling-house — construction.

Under a statute punishing any one who enters into or sufficiently near the dwelling-house of another, and in the presence or within the hearing of the family or any member of it, or of any female, uses abusive, insulting or obscene language, a conviction may be had although the offender was on his own adjacent premises, and used the words in ordinary conversation with his visitors without any intention to have them overheard by others.

THE opinion states the case.

Gardner & Wiley, for appellant.

Thos. N. McClellan, attorney-general, for State.

CLOPTON, J. The defendant is charged with a violation of the statute which declares: "If any person enters into, or goes sufficiently near to the dwelling-house of another, and in the presence, or within the hearing of the family of the occupant thereof, or any member of his family, or in the presence or hearing of any female, and makes use of abusive, insulting or obscene language, he shall be deemed guilty of a misdemeanor." Acts Ala. 1880-1, p. 30. The words spoken had reference to the wife of the occupant of the dwelling-house on a lot adjoining the lot on which defendant lived.

The court was requested to instruct the jury, that though the defendant may have used abusive or insulting language, she is not guilty, if she made use of the language on her own premises, in ordinary conversation with visitors, and without any intention of being heard by her neighbors.

The act amends section 4203 of the Code, which was considered insufficient to effectuate the predominant purpose, — the protection of the dwelling and the family from annoyance and indignity, caused by abusive, insulting or vulgar language being uttered in their presence. The inefficiency consisted in the fact, that the section made the use of the prohibited language at specified places an essential constituent of the offense — the dwelling, the curtilage thereof and the public highway near the premises. *Comer v. State*, 62 Ala. 320. The amendatory act, while preserving the protection of the dwelling *eo nomine*, substitutes, for the other two named places, the generical description, "or goes sufficiently near;" thereby extending protection to the neighborhood of the dwelling, without regard otherwise to the character of the place. The proposition of the charge is that a person may use abusive, insulting or obscene language, *ad libitum*, in the presence or hearing of females occupying an adjacent house, provided he utters it on his own premises, and in ordinary conversation with visitors. The freedom of home does not extend to the abuse or vilification of neighbors in their hearing. A person's own inclosure does not, in such case, afford immunity from guilt and punishment.

The tone of voice, whether loud or ordinary, is immaterial, provided it is loud enough to be heard, and is actually heard by any member of the family of the occupant of the dwelling. *Henderson v. State*, 63 Ala. 193. And whenever a person does an act prohibited by statute, the law presumes the intent to do the act. Doing the act voluntarily is evidence of the unlawful intent, and no other is requisite. *Bain v. State*, 61 Ala. 75. If the defendant, in crossing her yard, went sufficiently near to the dwelling of another, while passing to and from her house, and made use of abusive, insulting or obscene language, in the hearing of the family of the occupant, she is guilty of the statutory offense, though she may have been on her own premises.

Judgment affirmed.

Griel v. Solomon.

GRIEL V. SOLOMON.

(88 Ala. 85.)

Bankruptcy — new promise.

A debt discharged in bankruptcy may be revived by a promise to pay it, made between the adjudication and the discharge.

A debt discharged in bankruptcy is not revived by a new promise that "no matter what might happen to him, he would never let plaintiff lose any thing by him."

ACTION on account. The opinion states the case. The defendant had judgment below.

Troy, Tompkins & London, for appellants.

Rice & Wiley, contra.

SOMERVILLE, J. The suit is one on the common counts, brought by the plaintiffs against the defendant, Solomon, who is a discharged bankrupt, and pleads his discharge as a defense to the action. The main points of controversy arise on the alleged promises of the defendant to pay the debt, after the adjudication of bankruptcy, and before the discharge, and the character of the promise required to revive a discharged debt.

1. It was proposed by the plaintiffs to prove that the defendant promised to pay the debt sued on, during the time elapsing between the date of his adjudication as a bankrupt and the date of his discharge. The plaintiffs' replication alleges a new promise, made since the filing of the bankrupt's petition. On objection taken to this evidence by the defendant, it was excluded from admission to the jury. The court, in our judgment, erred in this ruling. The adjudication of a debtor's bankruptcy is the pivotal period of all bankrupt proceedings, from which flow all of his disabilities, as well as the attendant rights of creditors conferred by the law — being, as it is, a judicial ascertainment of the fact that an act of bankruptcy was committed at some antecedent period, which is fixed by relation, at the commencement of the bankrupt proceedings, which is the filing of the petition. The bankrupt is regarded as *civiliter mortuus*, as to all previous dischargeable debts and liabilities, from the date of such adjudication, so long as it continues unrevoked by

the court of bankruptcy in which the proceedings originated. *Gayle v. Randall*, 71 Ala. 469. Hence it is now settled by the great weight of authority, with comparatively few decisions to the contrary, that an express promise to pay a debt, made by a bankrupt before his discharge, but after his adjudication, is just as effective to revive the debt against him and to waive his expected discharge, as would a promise made after obtaining his certificate of discharge. Mr. Bump says: "There is no distinction between a promise made after the filing of the petition, but before the certificate and one made after it. Both are equally binding, the only consideration being the old debt. Bump Bankruptcy (8th ed.), 746. Under former bankrupt laws, a distinction was taken between promises made after the adjudication of bankruptcy, and those made after the filing of the petition; and it was held that a new promise, to overcome the effect of a discharge, must appear to have been made after the party was decreed to be a bankrupt; or in other words, after the adjudication. Hilliard Bankruptcy & Insolvency, 262, § 46. Under the law of 1867, there is no difference, practically, between the date of the *fiat*, or adjudication, and the date of the petition; because the first, as we have before said, extended by relation back to the latter date, as does also the discharge when duly obtained. In support of the view contended for by appellants' counsel, and announced by Mr. Bump in the extract above quoted, we need only refer to the following authorities: *Knapp v. Hoyt*, 57 Iowa, 591; a. c., 42 Am. Rep. 59; *Fraley v. Kelly*, 67 N. C. 78; *Hornthal v. McRae*, 67 N. C. 21; *Corliss v. Shepherd*, 28 Miss. 550; *Otis v. Gazelin*, 31 Me. 567; *Roberts v. Morgan*, 2 Esp. 736, and other authorities on the brief of appellant's counsel.

2. We consider next the nature of the new promise which will revive a debt discharged by bankruptcy, or what is the same in legal effect, will operate to waive the discharge of the bankrupt. In *Wolfe v. Eberlin*, 74 Ala. 99; s. c., 49 Am. Rep. 809, we discussed at length the effect of such promise in its relation to the plea of bankruptcy, and the rules of pleading on the subject, to which we need add nothing further. Speaking of the discharged debt, we there said: "The old debt has become extinguished by operation of law, and no longer exists. But the moral obligation to pay still exists and this, coupled with the antecedent valuable consideration, is sufficient to support a new promise, if clear, distinct and unequivocal in its nature." An implied promise is insufficient. It

Griel v. Solomon.

must be express, thus differing from the promise required at common law to take a debt out of the operation of the statute of limitations. It must be clear, distinct and unequivocal, such as to indicate on the part of the debtor "a clear intention to bind himself to the payment of the debt." So partial payments on a discharged debt are insufficient evidence of a new promise to pay the residue. *Allen v. Ferguson*, 18 Wall. 1; *Dearing v. Moffitt*, 6 Ala. 776; *Evans v. Carey*, 29 Ala. 99; *Bump Bankruptcy* (8th ed.), 744; *Hilliard Bankruptcy*, 265, § 53.

3. Such a promise may be either absolute, or it may be conditional. But if dependent on a condition or contingency, this fact must be stated by the pleader; and it must be averred and proved that the condition has been performed, or the contingency has happened. *Branch Bank v. Boykin*, 9 Ala. 320; *Dearing v. Moffitt*, *supra*; *Allen v. Ferguson*, *supra*; *Maxim v. Morse*, 8 Mass. 127.

4. A promise to pay so soon as the bankrupt is able is a valid condition, not void for uncertainty, and is so held generally by the authorities. *Taylor v. Sneed*, 4 Ala. 352; *Sherman v. Hobart*, 26 Vt. 60; *Bump Bankruptcy* (8th ed.), 745, 746, and cases cited; *Dearing v. Moffitt*, 6 Ala. 776, and cases cited. But to be available, the promise must be averred in proper form, and satisfactory proof adduced of the defendant's ability to pay—that is, of the fact that he has sufficient property or means to pay. *Mason v. Hughart*, 9 B. Monr. 480; *Hilliard Bankruptcy*, 266, § 55. The plaintiffs failed to aver, in their replication, any but an unconditional promise to pay.

It is easy to test the correctness of the court's rulings on the points covered by the foregoing principles, without examination of the various charges in detail.

5. The court did not err in excluding the statement made by the witness of Jacob Griel, one of the plaintiffs in the action, that at the time the account sued on was contracted, the plaintiffs knew that the defendant was "in a shaky condition; and that the matter was discussed between him and the defendant, and that defendant said to him that it mattered not what might happen to him (defendant), he would never let plaintiffs lose any thing by him." The evidence may tend to show that the defendant regarded the debt sued on as an honorary debt; but it could not be more relevant than reiterated verbal promises to pay, and such promises, made before the filing of the petition, would be inadmissible.

Frenkel v. Hudson.

The case of *Reed v. Frederick*, 8 Gray, 230, seems to be an authority directly in point, against the admission of the evidence offered. Hilliard Bank. 266, § 54.

[Minor points omitted.]

The judgment is reversed, and the cause remanded.

FRENKEL V. HUDSON.

(33 Ala. 158.)

Corporation — notice of equities — notice to agent.

Where an agent or officer of a private corporation sells and conveys land to it, his knowledge of an outstanding equity does not charge the corporation.

BILL for specific performance. The opinion states the case.

Overall & Bestor and Pillans, Torrey & Hanaw, for appellant.

Gregory L. Smith, contra.

SOMERVILLE, J. The appellee, Frenkel, as assignee of the Citizens' Mutual Insurance Company, an insolvent corporation, filed the present bill against the appellant, Hudson, who is assignee of the Point Clear Improvement Company, also an insolvent corporation, and other defendants, to compel specific performance of an alleged agreement to execute a mortgage to secure the purchase-money of certain real estate conveyed by the complainant insurance company, in February, 1885, to the defendant Adams, and by the latter to the defendant corporation, the Point Clear Improvement Company. A second aspect of the bill, claiming a vendor's lien on the same property, having been abandoned as untenable, need not be noticed in this discussion.

The main issue in our opinion, upon which the decision of the cause must turn, is whether the Point Clear Improvement Company, to which Adams conveyed the land, can be regarded as a *bona fide* purchaser for value, without notice of the latent equity sought to be fastened on the property in the present bill. The chancellor decided that the company, as vendee, was chargeable with such notice, and this finding is before us for review.

Frenkel v. Hudson.

Our first inquiry is, was the defendant company a purchaser for value?

[Omitting this inquiry.]

We next inquire whether the vendee of this property, the Point Clear Improvement Company, is chargeable with notice of Adams' defect of title. Did it have notice of the fact that he acquired title under an agreement of Goelet to execute the mortgage described in the bill? The corporation was organized for the purpose of carrying on a hotel business, and other enterprises collateral to this object. It was an artificial person, entirely separate and distinct from the natural persons owning shares of its capital stock. And this capital stock was a trust fund to be preserved for the primary benefit of the corporate creditors, a principle which has a potential bearing, as here in the case of insolvent corporations. *Glenn v. Semple*, 80 Ala. 159. It nowhere appears that the board of directors, or corporate managers of the company, had knowledge of any facts sufficient to put them on inquiry as to the existence of this equity. The only mode in which it is sought to bring home notice to the company is through its president, Goelet, who had actual knowledge of the alleged agreement, and it is insisted that the knowledge of the agent must be imputed to the principal. The general rule is, that notice of a fact acquired by an agent, while transacting the business of his principal, operates constructively as notice to the principal. This rule applies of course as well to corporations as to natural persons. *Reid v. Bank of Mobile*, 70 Ala. 199. It is based upon the principle, that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application however to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: First, that he will very likely in such case act for himself, rather than for his principal, and secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject. *Terrell v. Branch Bank of Mobile*, 12 Ala. 502; *Lucas v. Bank of Darien*, 2 Stew. 321; *Wickersham v. Chicago Zinc Company*, 18 Kans. 481; s. c., 26 Am.

Rep. 784; Angell & Ames. Corp., §§ 308, 309; Story Agency, § 140.

The testimony satisfies us that Goelet bought the land from the Citizens' Mutual Insurance Company for himself, at one price, and sold it at another to the Point Clear Improvement Company, in payment of a debt due for stock subscription. The contention that he bought for the defendant company is not sustained by the record. In making the sale therefore through Adams, he was acting for himself, in his own interest, and in an adversary character. It is not to be supposed that he communicated his knowledge of the alleged equity to his vendee, by informing its board of directors, or other managing officers, of the existence of such a prejudicial fact. His own knowledge, as president of the company, was insufficient to charge the company in its corporate capacity with notice.

The decree of the chancellor, being opposed to these views, is reversed; and a decree will be rendered in this court, adjudging the complainant not to be entitled to the relief prayed, and dismissing his bill

CARTER V. SMITH.

(22 Ala. 334.)

Marriage — wife's separate estate — oral ante-nuptial agreement — purchase of land with earnings of wife's business.

An oral ante-nuptial agreement that the husband shall not interfere with the business carried on by the wife, and shall not receive any of the profits accruing from it, unless reduced to writing, is void under the statute of frauds, so far as it was made in consideration of the intended marriage, and will not support a post-nuptial settlement founded on it.

Lands purchased and paid for by the wife, with the profits and earnings derived from business carried on by her in her own name, which have become a part of her statutory estate, cannot be subjected by the husband's creditors, though the conveyance was executed after the accrual of their debts; and where the consideration of the conveyance is an account of goods sold after the accrual of the complainants' debt, which were the accretions of her business, constituting a part of her estate, it cannot be considered as her subsequent earnings, and cannot be subjected to the payment of the debt.

CREDITOR'S bill to subject land to a judgment. The opinion states the case. The plaintiff had judgment below.

Carter v. Smith.

*Shelby, Walker & Spragins, for appellants.**Brickell, Semple & Gunter, and Humes & Sheffey, contra.*

SOMERVILLE, J. The appellees having recovered a judgment against Landon Carter, one of the appellants, in February, 1882, for an amount between four and five hundred dollars, in July, 1885, they filed this bill for the purpose of subjecting to its payment three separate parcels of land which had been purchased by his wife, and conveyed by deed to her, Mrs. Carter, as follows: The first, from one Donegan, on October 31, 1877; the second from one Patton, on September 21, 1876, and the third from one Newman, on April 27, 1877.

The theory of the bill is that the consideration paid by the wife for these lands belonged to the husband, being, as is alleged, the profits of her skill and labor accruing from her having carried on the trade or business of a milliner, and that for this reason the conveyances were void as against the appellees, who were creditors at the time each of these conveyances was made, and as is contended, also when a portion of such alleged earnings accrued. The account upon which the judgment was rendered accrued for goods sold to Mrs. Carter and used by her in her millinery business, the items of the account ranging between the dates of March 12, 1873, and November 13, 1874. Originally amounting to over \$2,000, this debt was reduced by the credit of sundry payments, to the sum merged in the judgment.

Apart from statutory provisions on this subject, the rule of the common law was, that the earnings of the wife, or such property as she acquired by her labor, skill or economy, belonged to her husband, the law regarding her merely as his servant. This rule prevailed in this State unabrogated, until the recent act of the general assembly, approved February 28, 1887, defining upon new principles the rights and liabilities of husband and wife. Acts, 1886-87, p. 80; *Gordon v. Tweedy*, 71 Ala. 202; *Evans v. Covington*, 70 Ala. 440; *Carleton v. Rivers*, 54 Ala. 467.

But the husband may contract with her, upon a sufficient consideration, to release such earnings, or he may by gift invest her with a separate estate in them, and such renunciation of his marital right, in the absence of actual fraud, will be upheld as valid, except as against existing creditors, who may avoid such gift as they could

any other voluntary transfer or conveyance. *Wing v. Roswald*, 74 Ala. 346; *Pinkston v. McLemore*, 31 Ala. 308; *Cahalan v. Monroe*, 70 Ala. 271. All that is required to this end is, that "the evidence of the gift must have been clear, and it must have been apparent the husband intended to divest himself of all right to them, and to set them apart to the separate use of the wife." *Evans v. Covington*, 70 Ala. 440, 442; *Shaffer v. Sheppard*, 54 Ala. 244. The essence of the whole transaction is the assent of the husband, clearly and satisfactorily manifested, and this may be shown by evidence that the husband permitted the wife to carry on a trade or business, in her sole name, and on her sole account, without any participation or interference on his part. 2 Bish. Marr. Women, § 420; Tyler Inf. and Cov. 483.

The evidence shows that Mrs. Carter was engaged in carrying on the millinery business prior to her marriage, which occurred as far back as December, 1852. Both she and her husband testify, that there was an ante-nuptial parol agreement between them, to the effect that he was to have nothing to do with the business, and receive none of the profits accruing from it. This however so far as it may be regarded as a promise or agreement made upon consideration of marriage, was void under the statute of frauds, because not in writing. Code, 1876, § 2121. A settlement made by the husband after marriage, in consideration of such parol agreement, must be deemed to be without legal consideration to support it, and to stand therefore upon the same basis as if it were purely voluntary. *Anderson v. Jones*, 10 Ala. 400; *Randall v. Morgan*, 12 Ves. 67; *Dygert v. Remerschnider*, 32 N. Y. 629; 39 Barb. 417; *Borst v. Gorey*, 16 Barb. 136; Bump Fraud. Conv. 312. We place no stress therefore upon this alleged parol ante-nuptial agreement, as no rights can be derived from, or claimed under it, as against creditors existing when the earnings of the wife accrued, if the property in question can be regarded as such. It can only be looked to in corroboration of the husband's subsequent alleged renunciation of his marital rights as to the wife's earnings in her trade. But as observed by Lord MANSFIELD in *Jarman v. Walloton*, 3 T. R. 620, "whether by any means a man might before marriage put his intended wife in a situation to carry on a separate trade, there was no authority he might not do so."

We entertain no doubt as to the correct *status* of the two first-named parcels of land conveyed to Mrs. Carter; the one from

Carter v. Smith.

Patton, in September, 1876, and the other from Donegan, in October, 1877. Taking the view most favorable to the appellees, these lands are shown to have been paid for by profits and earnings of Mrs. Carter, derived from her trade as a milliner, prior to the accrual of appellees' debt. These profits and earnings were accounts due her for goods sold and work done in her regular line of business, and constituted a part of her separate estate, by reason of the assent of her husband that they should be hers and inure to her separate use; if not also for the reason that they were the profits and accretions of a previous stock of goods constituting her separate estate, whether equitable or statutory it would be immaterial. If the consideration paid for the land was the wife's, the fact that the several conveyances were made after appellees became creditors of the husband would in no manner affect the validity of the transaction. The date of the conveyances would be immaterial, except as affecting the burden of proof. The controlling test would be, was the consideration paid to the grantors the property of the wife? *Wing v. Roswald*, 74 Ala. 346. The evidence shows that it was, and it follows that the chancellor erred in decreeing the sale of these two parcels of land for the satisfaction of the judgment debt of the appellees.

The land conveyed to Mrs. Carter by Newman, on April 26, 1877, stands on a different basis. The consideration paid for this was an account due Mrs. Carter for goods sold by her to the grantor, the items of which accrued between August, 1876, and January, 1883, or after the accrual of the debt due the appellees. How far any of these goods were enhanced in value, by the personal skill or labor of the wife is not shown. That they were a part of the separate estate of the wife can scarcely be doubted. She had been engaged in the millinery business as a sole trader, by permission of her husband, for about twenty years prior to the accrual of appellees' claim in 1873 or 1874. Her capital at first consisted of borrowed money, in which her husband neither had nor claimed any interest. The accretions to this, as we have seen, became her separate estate, whether derived from sales at a profit or otherwise, and up to the time appellees became creditors of the husband, they were without any legal rights to challenge the validity of prior gifts to her from him. The reason is, that such gifts were taken from no fund liable to pay the complainants' demand. It is not made to appear then, that the goods sold to Newman by Mrs. Carter, as itemized in this

account, were the proceeds of the wife's earnings, or resulted from her skill or industry applied after the debt of the appellees accrued, although the goods were sold after this date. It is only the gift of earnings acquired after this date which can be assailed as fraudulent, on the ground that they belong to the husband, as against the appellees in their capacity of complaining creditors. *McLemore v. Nuckolls*, 37 Ala. 662. These goods were not, properly speaking, the earnings of the wife's labor given to her by her husband after this date. They were rather accretions to her separate estate which had already accumulated, resulting from the sale of such estate at a profit, and brought about by her industry with the permission or the husband. Profits of this kind, like rents and interest, constitute when accumulated in the wife's hands, and sometimes even in her husband's, a part of the *corpus* of her separate estate, whether equitable or statutory, "although if the husband had once converted them to his own use, he would be under no obligation to account to the wife for them, and a repayment of them would be fraudulent and void as to existing creditors." *Wing v. Roswald*, 74 Ala. 346. The proceeds of sale of the wife's separate estate, when re-invested, still remain her separate estate. And this result cannot be changed, whether the sale be made by the industry of the husband or that of the wife, nor by the amount of profit reaped by the sale. The husband may lawfully spend his own personal labor in improving the wife's estate, without any fraud on his creditors. *Holt v. Sorrell*, 11 Ala. 386. He may, with equal right and justice, permit the wife to enhance her own property by her personal industry, and no creditor can complain of the act as a fraud on his rights. *Sharp v. Sharp*, 76 Ala. 312; *Allen v. Terry*, 73 Ala. 123; *Crockett v. Lide*, 74 Ala. 301; *Lee v. Tannenbaum*, 62 Ala. 501.

It results from these principles, that the chancellor erred in the decree condemning the lands to the payment of the judgment of the complainants. The decree is therefore reversed, and a judgment will be rendered in this court dismissing the bill.

Decree reversed.

NEWSOM V. THORNTON.

(88 Ala. 408.)

Will — legacy — charge on land.

While a general or residuary devise of lands, "after the payment of legacies," charges those lands with the payment of legacies, those words will not apply to a specific devise in a former clause of the will, to which particular conditions are annexed, though the devisee is also nominated as executor.

BILL to charge a legacy on land. The opinion states the case. Complainant prevailed below.

R. C. Brickell and Humes & Sheffey, for appellants.

OLOFTON, J. The title of the appellee, who brought the bill, to the relief granted by the chancellor, depends upon the determination of the question, whether the pecuniary legacy, given to his intestate by the will of Whitmell Rutland, is a charge on the lands devised to Whitmell Rutland Newsom, who was also the nominated and qualified executor. If this question is held adversely to complainant, it will be unnecessary to consider any minor or incidental question presented by the record.

The will was drawn by an unskilled draftsman, inartificially, and without regard to proper punctuation, capitalization, or a proper separation of the several clauses. After making a devise and bequest of land and personal property to one of the daughters of the testator, bequests of personal property to several of his grandchildren, pecuniary legacies to another daughter and two grandchildren, a devise of lands, upon conditions thereafter expressed, to Whitmell Rutland Newsom, followed by a residuary clause, giving to him the residue of the estate, the will contains a qualification or limitation, expressed in the following terms: "after the payment of all my debts and specified legacies." One of the specified legacies is the legacy to Elizabeth W. Johnson, who is complainant's intestate, of \$2,000, to be paid to her as soon as possible out of the estate; and the purpose of the bill is to enforce a charge on the lands devised to Whitmell Rutland Newsom, for the payment of the legacy.

Ordinarily, the personal assets constitute the primary, and *prima facie* the exclusive fund, from which pecuniary legacies are to be

paid. They are not charges on the real estate, unless the testator so directs, either expressly or by implication. There are no explicit words in the will creating such charge; and when it is sought by implication, the expressions and dispositions of the will, its whole tenor should satisfy the court of construction of the intention of the testator, that though the personal assets may be insufficient, the pecuniary legacies shall be paid at all events. In the present case, no question arises as to the consideration of extraneous circumstances, none being alleged or proved. The intention of the testator must be inferred from the provisions of the will, and the circumstances apparent on its face. *Taylor v. Harwell*, 65 Ala. 1.

In this State, a devise of lands, "after the payment of debts," does not create a charge by implication. The doctrine is considered as opposed to the spirit and policy of statutes, which charge the whole property of the decedent, real and personal, not exempted, with the payments of his debts, and provide for its sale for this purpose. *Starke v. Wilson*, 65 Ala. 576; *Lewis v. Ford*, 67 Ala. 143. The rule in respect to debts, on the ground upon which it is rested, is inapplicable in the case of legacies. Where debts and legacies are charged together, they are not, under our decisions, considered as placed on an equal footing. As to the latter, the established canons of construction apply; but the court will not be forward to avail of circumstances to onerate the land. It is well settled, that when the testator directs the devisee to pay legacies; or devises land, or the *residuum* of his estate, real and personal, after the payment of legacies, the real estate is charged. There can be no question, that the language—"after the payment of all my debts and specified legacies"—does constitute the specified legacies a charge on the property referred to. The sole question is, does this language refer to the lands devised to Whitmell Newsom?

The devise is specific. The words which, it is claimed, create the charge are at the end of and accompany the residuary clause. Generally, in the cases in which the terms of the residuary clause have been held sufficient to onerate land with the payment of legacies, the testator, having given pecuniary legacies without designating a fund for their payment, gave the residue of his estate, real and personal, blended in a common fund; there being no previous devise of portions of the real estate. 2 Jarm. Wills, 604. The inference is deduced on the principle that he must have intended

the *residuum* after paying the legacies, as otherwise there could have been no residue. *Parson v. Potts*, 2 N. J. Eq. 313.

In *Couzon v. Couzon*, 7 H. L. Cas. 168, the testator, after having devised freehold estates to trustees for a term of years, to pay an annuity to his wife and to one of his sons for life, the estate on the death of the son to go to his sons in tail male, having given other lands to other sons, and having created and given legacies, directing the properties to fall, in certain events, into his residuary estate, added at the end of the will, which also contained a residuary clause, embracing property both real and personal: "In case my personal and chattel property shall be inadequate to the payment of the pecuniary legacies bequeathed by this my will, the deficiency shall be paid out of my real and freehold estates, and I hereby charge and incumber the same with the payment thereof;" and by codicil said: "I charge and incumber all my estates of every description, both real and personal, with the following legacies," being some additional pecuniary legacies. It was held that the legacies were not charges on the specifically devised estates. Alluding to a decision of Lord MANNERS, in *Spong v. Spong*, on a will containing substantially similar provisions, the lord chancellor says: "The principle which I collect from that case is, that where there is a specific legacy or devise once given in a will, the presumption is that it is the intention of the testator that the legatee or devisee should have it as it is given, in its integrity and without derogation; and that a general charge, which in terms may comprehend the specific bequest or devise is not sufficient of itself to show an intention to take it away again." And Lord CRANWORTH says: "The rule is, that the presumption is against an intention to charge lands specifically devised, and that a mere charge 'on all my lands,' is not sufficient to rebut the presumption." The principle settled in *Spong v. Spong*, 3 Bligh, 84, was re-examined and re-affirmed.

We do not make these citations, as expressive of our concurrence in the particular application, but as a forcible statement of the rule and as illustrating the strength of the presumption in favor of the exoneration of lands specifically devised. It is unnecessary for us to go so far, as the will under construction contains no general charge which comprehends in terms the specific devise. Whether it is included in the charge as created is matter of implication. The principle settled by the decision is, that in construing charges

of legacies, specific and residuary devises are to be distinguished, though for many purposes of a common nature. It is not a case of blending. A specific devise or bequest separates a part of the property from the rest, which ordinarily is not subject to the provisions of the will as to the residue. A residuary clause, to have of itself the effect of creating a charge, must embrace all the real estate, otherwise it will be presumed that the testator intended only that portion which had not been previously given. The gift of a pecuniary legacy, followed by a devise of the residue of the estate, real and personal, will not by itself create a charge for its payment on lands previously disposed of in the will. 2 Lead. Cas. Eq. 348; *Lupton v. Lupton*, 2 Johns. Ch. 614. The expression, "to be paid unto her as soon as possible out of my estate," does not rebut the presumption.

It may be contended that payment of the specified legacies is one of the conditions upon which the devise is made; as included in the words, "upon conditions hereinafter expressed." Such seems to be the theory upon which the decree is founded. It is apparent from the structure of the will, that the expression of the conditions was reserved until all the devises and bequests to Whitmell Newsom were provided; until the property given to him was sufficiently designated, and the whole estate disposed of. The conditions to be expressed apply only to the property conditionally given to him, not as affecting its *quantum*, but the nature of the gift, the management, control and preservation of the property, and the continuance of the estate. Such conditions, thereafter expressed, are contained in the provisions of the will which follow the residuary clause, and the language on which the charge is rested, and which provide that the property given conditionally shall be kept together and worked on the land, and that the brother of the testator shall remain on the farm, and be supported so long as he may live; and for the disposition of the property, in the event that Whitmell Newsom should die leaving no lawful issue surviving him. The residue of the estate is given, as expressed in the residuary clause, "upon the same conditions," which words refer to the conditions alluded to in the previous devise to be afterward expressed. The words, "after the payment of all my debts and specified legacies," constitute a substantive and distinct clause, having no reference to the conditions referred to in the devise. They were intended to qualify, in respects other than the conditions

upon which the devise of the land is made, and to mean something not expressed by the words, "upon the same conditions." Their application to qualify and define the amount of the remainder of the estate, which should pass by the residuary clause — being what may remain after payment of debts and legacies — is the natural and ordinary use and meaning of the words, as collocated in the will.

The devisee is not the heir of the testator. The mere circumstance, that he is also the executor, does not suffice to charge lands specifically devised. The will does not specially direct by whom, or how the legacies shall be paid. The duty and liability to pay them devolves on him in his executorial capacity, and not as devisee. As he might have renounced the executorship, without impairing the devises and bequests to him, so he may accept it without incumbering the devised lands with any charge not otherwise imposed by the will. The construction should be the same as if a stranger had been appointed executor, and not varied as a devisee, not being an heir, may or may not accept the appointment. *Pazson v. Potts, supra.*

The will was made in 1855. On examination of all its provisions, it clearly appears that the testator supposed, and made his will on the supposition, that his personal estate was amply sufficient to pay his debts and the specified legacies and to leave a residue, and that there would be no occasion to charge the lands with them. The presumption is that he intended the legacies to be paid out of the same estate from which he had also given specific legacies of personal property, being the fund which is by law primarily, and *prima facie* exclusively, devoted to such purpose. The testator could not have intended that the pecuniary legacies should be paid at all events, to the impairment of the integrity of a specific devise to one who seems to have been the special and favored object of his bounty. In this connection, the reservation, that the daughter of the testator, and mother of the devisee, shall have the right or privilege to occupy the dwelling and out-houses on the devised lands, during her widowhood or life-time, is significant of the intention of the testator.

From the expressions and dispositions of the will and the circumstances apparent on its face, a charge of the pecuniary legacies on the specifically devised lands cannot be implied without disregarding settled rules of presumption and construction. The presump-

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tion of an intention that the devisee should take the lands, without such incumbrance or diminution, must prevail. *Davis v. Gardner*, 2 P. Wms. 187.

Decree reversed, and decree will be here rendered dismissing the bill.

BASS FURNACE COMPANY V. GLASSCOCK.

(82 Ala. 452.)

Master and servant — discharge — drunkenness.

A master may discharge his servant for public drunkenness and disorderly conduct, although it was only on one occasion, and did not incapacitate the servant or cause him to fail in the performance of his work.

ACTION for breach of contract of employment. The opinion states the case. The plaintiff prevailed below.

Walden & Son, for appellant.

Matthews & Daniel, contra.

SOMERVILLE, J. 1. The first portion of the charge given by the court, to which exception is taken, raises the inquiry, under what circumstances an employer is justified in discharging an employee from his service on the ground of drunkenness. The plaintiff was employed by the defendant company to reduce to charcoal, or as expressed by the witness, to "coal" the wood on a tract of land owned by the company, for which he was to be paid wages at the rate of \$50 per month. The evidence tends to show that the plaintiff, a short while before his discharge, was drunk on the premises of the defendant, where an iron furnace was in process of operation, about four miles away from "the coaling," as it is called, and while so intoxicated, he there "raised a disturbance, and had a fight with a man." At another time he was seen "drunk, in a wagon with some negro women, going toward the coaling." This is all that is shown by the evidence bearing on this point, no details being given. The court charged the jury, that "the fact that the plaintiff was drunk once, or a number of times, at the furnace or elsewhere, during his employment under the contract, is no evidence against plaintiff's right of recovery, unless drunkenness incapacitated

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and caused the plaintiff to fail in his part of the contract." Is this a correct statement of the law on this subject?

To justify an employer in discharging a servant, or employee, the rule, no doubt, is that the servant must have been guilty of conduct which can be construed to be a breach of some express or implied provision in the contract of service. It seems to be settled, that it is an implied part of every contract of service, that the employee will abstain from habitual drunkenness, or repeated acts of intoxication, during the period of his employment. If he be guilty of this indulgence, his conduct will justify his dismissal. 2 Add. Cont. (Morgan's ed.), § 890; *Wise v. Wilson*, 1 Car. & K. 662; 2 Para. Cont. 36 note (f); *Gonsolis v. Gearheart*, 31 Mo. 585; *Huntington v. Cloffin*, 10 Bosw. 262. There may be circumstances however under which a single act of drunkenness would warrant a servant's discharge; as for example, in the case of a minister of the gospel, where the act might bring personal reproach, and tend to degrade the moral standard of religion; or of a family physician, where it might result in negligence or malpractice in pharmacy or surgery. Wood on Mast. and Serv., § 111, p. 213. The same act, when committed by a day laborer, in privacy, and when off duty, or on some rare occasion when great temptation was presented, might not be a sufficient excuse for his discharge. The rule is stated by a recent author to be, that intoxication, while in service, is generally a good excuse for discharging a servant, particularly when it is habitual, and interferes with the discharge of his duties, or will be likely to. But it is held, that as to whether it is to be regarded as a proper excuse, depends upon the occasion. Wood on Mast. and Serv., § 3, p. 213. We do not doubt that public drunkenness of any employee, while in the service of his employer, and manifesting itself in boisterous and disorderly conduct, either toward the employer or third persons, is such misconduct as to constitute a violation of the stipulation, implied in every contract of service, that the employee will conduct himself with such decency and politeness of deportment as not to work injury to the business of the employer. This he can do by a single act of drunkenness, which may tend to offend the reasonable prejudices or tastes of the public, or impair their confidence, or render him disagreeable in social or business intercourse. The drunkenness of employees may well deter the patrons of any business establishment from continuing their business intercourse with it, especially when social contact is fre-

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quently necessary to its consummation. It may prove also equally offensive to the master or employer, who may justly regard sobriety as an indispensable element of efficient service. The charge of the court laid down the rule, that no drunkenness justified the plaintiff's discharge, unless it incapacitated him, and caused him to fail in the performance of his part of the contract. This under the principles above declared was erroneous, and must work a reversal of the cause. We may add, that the act approved February 17, 1885, entitled "An act to prevent public drunkenness," and making it a misdemeanor under certain circumstances, has no bearing on this case, having been passed after the present alleged cause of action.

[Minor questions omitted.]

Judgment reversed and remanded.

OLEERE V. OLEERE.

(89 Ala. 561.)

Compromise — rescission for fraud — undue influence

The complainant, a young man of dissipated habits and addicted to intoxication, was induced by the defendant, a mature and experienced man, to become his guest at a hotel where he and his family resided, at a distance from his own friends and relations, and there, while drinking to excess, he was privately induced by the defendant to assent to a compromise of his claims worth \$5,000 for some \$1,500. *Held*, that the compromise should be set aside.

BILL for accounting of administration and guardianship and to enforce a vendor's lien. The opinion states the case. The defendant had judgment below.

Brickell, Semple & Gunter and Wm. S. B. Cooper, for appellant.

W. P. Chitwood, contra.

CLOPTON, J. The only assignments of error urged in argument are directed to that part of the decree from which the appeal is taken, which gives effect to a compromise and settlement entered into by appellant with James E. Moore, as executor of S. S. Anderson. The instrument, which is signed by appellant alone, acknowledges having received from Moore, as such executor, the sum of

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\$1,500, by the assignment of the proceeds of one hundred and thirty-one acres of land, specially described, which constituted a part of a large tract of land mortgaged by appellee, G. D. Cleere, to Anderson. Moore, as such executor, agreed to sell the lands under the mortgage, at as early a day as the law will permit, and appellant agreed to bid for the lands the amount assigned; and should the mortgage be satisfied without a sale, Moore was to pay appellant \$1,500, which sum paid, as above mentioned, appellant accepted as full payment from the estate of Anderson, and from the sureties on the bonds of Cleere as administrator and as guardian, and released and discharged them from any and all liabilities as individuals and as such sureties. Appellant further agreed to waive all liens, as vendor or otherwise, to which he was entitled, on the lands embraced in the mortgage to Anderson, or in any mortgage to the sureties on the guardian's bond, and to dismiss the present suit as to all the defendants, except the administrator and guardian, and especially as to the estate of Anderson and the sureties on both bonds; Moore agreeing to pay one-half of the accrued costs. On the presentation of the instrument, the register or chancellor was authorized to dismiss the suit, on the terms stated, as to the parties mentioned. We have stated the substance and legal effect, as the instrument is unnecessarily prolix. A statement of the purposes of the bill, and of the state of the litigation, showing the relative rights and liabilities of the parties, is necessary to a full and correct understanding of the settlement and release.

Upon the death of complainant's father, the defendant, G. D. Cleere, qualified as administrator of his estate, and was subsequently appointed guardian of complainant, who was then a minor. Under an order of the Probate Court, the administrator sold the lands of the estate, and himself became the purchaser. The sale was reported and confirmed, but no report of the payment of the purchase-money was made, and no conveyance executed under an order of the court. The administrator, while being both administrator and guardian, made a final settlement of his administration in April, 1860, on which he was charged with the purchase-money of the lands and the personal assets, and was directed to retain as guardian the share ascertained to be coming to complainant, being \$3,492.34. This settlement is a nullity, the Probate Court being without jurisdiction on account of the antagonistic interests represented by the administrator; and the case must be considered as if no final set-

tlement had been made. *Hays v. Cockrell*, 41 Ala. 75; *Tankersly v. Pettis*, 61 Ala. 354.

On April 8, 1876, the administrator executed to Anderson a mortgage on the lands, except a quarter section which he conveyed to his wife, to secure a described indebtedness of over \$10,000; and subsequently, but on the same day, made a second mortgage to the sureties on his bond as guardian, to indemnify them as such sureties and to secure certain debts which he owed them individually. The bill was brought by appellant in July, 1878, to obtain a final settlement of the administration and guardianship, and to enforce a vendor's lien on the lands for the amount of the unpaid purchase-money due him, claiming a lien superior to the lien created by the mortgages. Anderson having died, Moore was made a defendant as his executor and as an individual, and the other sureties on both bonds, included in the compromise and settlement, were made parties. Moore, as such executor, filed a cross-bill to appoint a receiver and to marshal the securities, and a cross-bill was also filed by the sureties on the guardian's bond, being the mortgagees in the second mortgage. This was the *status* of the suit and the litigation at the time the compromise and settlement were entered into, January 20, 1880, so far as necessary to be stated for the purposes of this case. On May 11, 1880, the settlement and release were set up by amendment of the answers of Moore as executor and of the sureties, and by amendment of the cross-bills. In the view we take of the question raised, it is unnecessary to consider whether effect should have been given to the settlement without requiring the performance by the defendant contracting party.

Sections 3039 and 3040 of the Code are legislative enactments founded on the policy of the law, which favors the compromise and termination of litigation, whatever may be its character. The first declares: "All receipts, releases and discharges in writing, whether of a debt of record or a contract under seal or otherwise, must have effect according to the intention of the parties to the same." And the second provides: "All settlements in writing, made in good faith for the composition of debts, must be taken as evidence and held to operate according to the intention of the parties, though no release under seal is given and no new consideration has passed." The purpose of each section is the abrogation of certain common-law rules, technical in their nature. The effect is to make valid and operative written discharges and written settlements for the

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composition of debts, though executed without a seal and without new or additional consideration. *Singleton v. Thomas*, 73 Ala. 205. Other than these exemptions from the rules at common law, releases and compromises derive no potency from the statutes, and are governed by the rules which equity applies in such cases. The statutes are designed to give effect to releases and compositions according to the intention of the parties when made in good faith. They may be shown to have been given by mistake of fact, or by surprise, or obtained by undue influence, or by misrepresentation or concealment of material facts, or may be avoided for any cause sufficient in equity to invalidate a contract. *Cowan v. Sapp*, 74 Ala. 44.

Though mere inadequacy of consideration, ordinarily, is not sufficient to annul and set aside a contract, when the parties are in a situation to exercise independent judgment in determining its value, and to act knowingly and intentionally; and though it furnishes no ground for the interference of equity, which in such case leaves the parties to the consequences of their own improvidence, yet the inadequacy may be so gross as to furnish "the most vehement presumption of fraud." In 2 Pom. Eq. Jur., § 927, the learned author says: "The doctrine is settled by a *consensus* of decisions and *dicta*, that even in the absence of all other circumstances, when the inadequacy of price is so gross that it shocks the conscience and furnishes satisfactory and decisive evidence of fraud, it will be sufficient ground for cancelling a conveyance or contract, whether executed or executory." In such case the inadequacy of consideration is not the ground of interposition, but the fraud, which follows as a conclusion from the degree of grossness, whereby the conviction arises and abides, though there be no direct evidence that the contract was obtained by imposition or by some improper means. *Saltonstall v. Gordon*, 33 Ala. 149; 2 Lead. Cas. Eq. 1238.

It is morally certain from the evidence that Moore was cognizant of the financial inability of the mortgagor to pay the mortgage debt without a sale of the property. Hence the alternative agreement, that claimant should bid for the land the stipulated amount. While the nominal consideration was stated at \$1,500, there was no absolute agreement to pay that amount. The land was the real consideration in probable and reasonable prospect, the value of which, disconnected from the balance of the tract, according to

the evidence disclosed by the record, did not exceed \$500. Practically, for this consideration the complainant waives his lien on the lands and releases the sureties from all liability. It may be that coupling the agreements to assign \$1,500 of the proceeds, and if necessary, to take the land at that estimated value, relieves the consideration from inadequacy so gross as to furnish of itself satisfactory and decisive evidence of fraud. But it is not necessary in this case to infer, from the mere inadequacy of the consideration, that the compromise was improperly obtained. When gross inadequacy, though not sufficiently gross to be the basis of an inference of fraud, is combined with incidental circumstances showing bad faith or undue advantage; when it is coupled with weakness of mind, produced by any cause, with pecuniary distress or suspicion of fraud, the courts will withhold the benefits of the contract from the offending party, whether claimed affirmatively or defensively. *Lester v. Mahan*, 25 Ala. 444; s. c., 60 Am. Dec. 530.

The complainant was a man of intemperate habits, which was known to Moore, who invited him to go to Belgreen, where Moore resided, away from his friends and relations. Moore informed the ladies, including his own daughter, at the hotel where he was boarding, that complainant was coming, and that he wanted to make a compromise or trade with him, and requested them to make it pleasant and agreeable to him. Complainant remained at Belgreen, staying at the hotel at which Moore was boarding about a week, during which time he drank to excess. Moore informed Petree, at whose saloon complainant had drunk at times, that he wanted to effect a compromise and was anxious to get it fixed, and requested Petree not to interfere in the compromise. When complainant went to Petree for advice it was refused because of this promise. No person seems to have been present at any interviews between Moore and complainant during his stay at Belgreen, nor is it shown that any interview took place; if any, they were private. On the morning of the last day of his stay, complainant signed and acknowledged the settlement, which was written by Moore, before the clerk of the Circuit Court, who says he was apparently sober. This is the first information given of the compromise having been made.

The evidence makes a case of a deliberate and preconceived plan by a man of experience and mature years to induce a young man of dissipated habits, addicted to excessive drinking, to become his

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guest at the hotel at which he and his family resided, and at a distance from his friends and relations, to bring him under influences that would make him more plastic and more easily induced to make the compromise which Moore was anxious to effect; to prevent the advice and interference of others and to procure his signature to a settlement when a suitable time and occasion were afforded. These circumstances are not purged of their suspicious character, because complainant may have had mental capacity to contract, nor because he may have been sober after leaving Belgreen, nor because he may have wanted to get the money while living. It is not a question of mental capacity, but good faith, though the probable effects of previous excessive drinking may be considered. Threats of protracted litigation and a pressing desire and need of money may have been inducements brought to operate on him. The record is silent as to the circumstances under which he agreed to the compromise and his knowledge of its contents. The incidental circumstances, combined with gross inadequacy of consideration, which create a conviction of circumvention and undue advantage, call for explanation and exact of those claiming the benefits of the compromise to show that complainant acted intentionally, with knowledge of its nature and contents, and that no undue advantage was taken of his situation. In the absence of such explanation, the conclusion of fraud follows, and equity will not give effect and operation to the settlement. *Campbell v. Spencer*, 2 Bin. 129; *McKinney v. Pinckard*, 2 Leigh, 149; s. c., 21 Am. Dec. 601; *McCormick v. Malin*, 5 Blackf. 509; 2 Pom. Eq. Jur., § 928.

There are other considerations. Neither Moore nor any of the sureties paid or obligated themselves to pay complainant any thing. No consideration moved from them for their discharge and release. The whole burden of the consideration was attempted to be cast on Anderson's estate, though the sureties were to receive large personal benefits. They claim under and by virtue of a contract made with the personal representative and purporting only to bind the estate. The successor in the administration of the estate, Moore having died, repudiates the compromise on the record and refuses to perform it. We shall not consider the authority of Moore, as executor, to bind the estate in the manner attempted, nor whether a court of equity would enforce the agreement against the estate. We take it to be a rule without exception, that equity will not enforce a contract in favor of a party who not only does not ask its

enforcement, but repudiates the contract, and subject the other party to a separate suit and different litigation to get the reciprocal benefit. The succeeding administrator had the same authority to rescind as the executor had to make the contract. The complainant was authorized to treat it as rescinded, all parties being thereby placed in *statu quo*. The sureties have no independent equity, and claiming under and through the compromise, whatever equity they may have had thereunder, falls with the right and equity of Anderson's estate.

In either aspect the parties are not entitled to the benefits of the compromise. As the register has reported that there is nothing due from Cleere as guardian, which report has been confirmed, no liability rests on the sureties on his bond as such. They can only be made liable for the costs of any unsuccessful litigation instituted by them.

The conclusion reached by the chancellor precludes the consideration of other questions which may now become material. They are not properly before us. The taxation of the costs will be different on another hearing.

Judgment reversed and remanded.

BELL V. WATKINS.

(22 Ala. 512.)

Marriage—conveyance in trust for married woman and children—when her interest not liable for her debts.

Under a conveyance of three hundred and eighty-five acres of land, worth about \$2,400, in trust for the use and benefit of a married woman and her children, the trustee being directed to permit the husband to use the lands for the use and benefit of his wife and children, for their support and the education of the children, and upon the further trust, that upon his death the said lands are to be equally owned and divided by and between all the children then living, "and if the wife shall survive him, then she is to take a child's part of said land for her life only," *held*, construing the deed in connection with the value of the property, the condition, number and relationship of the beneficiaries (including after-born children) to the grantor, that he intended the property should be jointly used and enjoyed by the wife and children as a family, and that her interest in it could not be separated and subjected, by bill in equity, to the payment of her debts.

Bell v. Watkins.

BILL to subject a trust fund to a judgment. The opinion states the case. Dismissed below.

Watts & Son and Edw. de Graffenreid, for appellant.

Charles E. Waller, contra.

STONE, C. J. The rights of the complainant in this cause depend on the proper interpretation of the deed of Bryan Watkins, bearing date November 27, 1866, made an exhibit to the bill. As to the provision made for the benefit of Mrs. Sarah Gertrude Watkins, the deed excludes the marital rights of her husband, and consequently whatever interest she takes under the deed is equitable as contra-distinguished from statutory separate estate. *Jones v. Reese*, 65 Ala. 134. The deed, giving to the entire instrument its proper construction, vests no estate or interest in John B. Watkins, the husband. *Spear v. Walkley*, 10 Ala. 328. We do not understand counsel as controverting this, but as conceding it. The demurrer therefore, to the original bill was rightly sustained. The bill was then amended, so as to abandon and strike out all claim of relief based on any interest in John B. Watkins, the husband.

The clause of the deed, under which it is claimed that Mrs. Sarah Gertrude Watkins has an interest in the property which she can and did charge, directs the trustee to " permit the said John B. Watkins to use, occupy, and cultivate the said land, for the use and benefit of his wife and children, for their support and the education of the children; and if the said John B. should survive his wife, then for the use and benefit and education of his children; but in no case are the said lands to be liable for the debts and contracts of the said John B. Watkins. And then upon the further trust, that upon the death of the said John B., said lands are to be equally owned and divided by and between the children of the said John B. then living; and if any of his children shall have died, leaving a child or children, such child or children shall take their deceased parent's share. And if the wife of the said John B. shall survive him, then she is to take a child's part of said land, for and during her life, and after her death, her part is to go to the aforesaid children; but in any event, her interest in said lands hereby conveyed is to cease and be determined at her death. So long as the said John B. Watkins shall faithfully apply the rents and profits of said lands, or the profits

arising from the cultivation of the same, to the uses and purposes above indicated, then he is to receive the same, and is not to account to any one therefor."

It is manifest that under the terms of this deed Mrs. Watkins acquired no present interest in the lands as land, nor in the title to the same; and that she can acquire none during the life of her husband. At her husband's death, if she survive him, she will be entitled to a life-estate in a child's part of the land—a contingent remainder. And during the joint lives of the husband and wife, she is entitled, out of the income and profits, to share in the support equally with her children, while the latter have the additional right to be educated therefrom. This is the extent of her interest.

In the case of *Fellows v. Tann*, 9 Ala. 999, a father by deed had conveyed property to his daughter, "for the use and support of herself and her heirs during their lives;" and after the death of the daughter, the property to be equally divided among her heirs. The daughter was then the widow of one Barnett, but she soon afterward intermarried with Tann. Under a judgment and execution against Tann, an attempt was made to sell the property in satisfaction of it. The court declined to decide whether the husband took any interest in the property, but decided that if he took any interest, it could only be reached and separated in a court of equity. It was said, the deed invested "the mother and her children collectively with interests which the creditors of the husband cannot divest, as it respects the latter, through the medium of any forum." As we have said, it was not decided in this case whether there was an interest which could be separated in equity. *Jasper v. Howard*, 12 Ala. 652, decides substantially the same thing as *Fellows v. Tann*.

The case of *Rugely v. Robinson*, 10 Ala. 702, is the first and leading case which bears directly on the question we have in hand. The will in that case conveyed property to a trustee, "for the use and benefit of the said E. T. R. (husband, son of the testator) and his family, during the term of the said E.'s natural life; and from and after his death, to the use of such persons as the same may be devised and bequeathed by the said E. T. R. in his will; and in the event no will shall be made, then to the heirs at law of the said E." The property was large, and a bill was filed to subject the said E. T. R.'s interest to a judgment against him. It was held that, "so far as the bequest includes property which is intended to be used jointly by E. and his family in specie, as a house, furniture, house-

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hold servants, etc., it is incapable of severance, and cannot be reached by his creditors." As to other property, from which a revenue was to be derived by its employment, it was held that his interest could be separated, and subjected. That case came again before this court, and the principles first settled were adhered to. 19 Ala. 404.

In *Hill v. McRae*, 27 Ala. 175, a bequest was made to a trustee, for the use and benefit of testator's son Thomas. It directed the trustee "to pay over to the said Thomas, from time to time, such part of the income of said trust estate, or the whole thereof if required, as may be necessary for the comfortable and reasonable support of the said Thomas, and of his wife and children, should he have any; the same to be used by the said Thomas." The will then made provision for the disposition of the property at Thomas' death. Thomas was unmarried at the time of testator's death, but married subsequently, and had no children. A judgment creditor of said Thomas sought by bill to subject his share of the income to the satisfaction of the judgment. Relief was denied. In the opinion of the court is the following language: "In the case before us the provision is for the comfortable and reasonable support of Thomas and his wife. It is a joint benefit conferred upon both, as we must intend it was contemplated by the testator that they were to subsist at the same board, and enjoy their support as is common to the relation of husband and wife; and no more is to be paid by the trustee than is necessary for their support. * * * The donor or testator has an individual right of property, as has been well said, in the execution of the trust; and to divert it to a person or purpose not intended would be an invasion of his dominion and a fraud upon his generosity. It would be to cut off improvident families from all sources of benevolence and interpose a perpetual barrier to the exercise of paternal duty. Such is not the law." The following authorities support the doctrine in *Hill v. McRae*; *Godden v. Crowhurst*, 10 Sim. 643; *Wetherell v. Wilson*, 1 Keene, 81; *Kearaley v. Woodcock*, 3 Hare, 185; *Hughes v. Pledge*, 1 Leigh, 443; *Perkins v. Dickinson*, 3 Grat. 335; *Holdship v. Paterson*, 7 Watts, 547; *Ashurst v. Given*, 5 Watts & Serg. 323.

The case of *Hill v. McRae*, *supra*, has never been in terms overruled; but the later cases of *Robertson v. Johnson*, 36 Ala. 197, and *Jones v. Reese*, 65 Ala. 134, are relied on as upholding the equity of the present bill. In the first of those cases, following

what had been decided in *Rugely v. Robinson*, 10 Ala. 702, both the principle and its limitation are expressed, and thereby approved, in the following language: "That a beneficial interest cannot be given to one so that it cannot be reached by his creditors, unless such interest is conferred and is to be enjoyed jointly with others, and is also incapable of severance." And in the later case of *Jones v. Reese*, 65 Ala. 134, in stating the question for decision, the following language is employed: "Does it (the will) vest in Lewis C. a beneficial interest in the mortgaged premises, or in the rents, incomes or profits, which is not so joined and blended with the estate or interest of his family, as to be incapable of severance?" It is manifest that in neither of these cases was it intended to overrule or modify the principles declared in *Rugely v. Robinson*, but rather to affirm them. In each of the three cases, *Rugely v. Robinson*, *Robertson v. Johnson* and *Jones v. Reese*, the property conveyed appears to have been relatively large; so large, that it was thought there would be a surplus above maintenance; and in the later two cases it is not shown that there was any part of the property conveyed, which was specially intended to be used jointly by the beneficiaries, as was the case in *Rugely v. Robinson*. It should be added however that the following cases seem to support the ruling of the court granting relief in the case of *Rugely v. Robinson*: *Rippon v. Norton*, 2 Beav. 63; *Page v. Way*, 3 Beav. 20; *Raikes v. Ward*, 1 Hare, 445.

The entire property conveyed in the deed, which gave rise to the present suit, is three hundred and eighty-five acres valued in the face of the deed at \$2,400. What has been and is its net annual profit or income is not set forth. It is not averred that the land had any special or exceptional value by force of its location or surroundings. Our experience and common knowledge convince us the income could not be large. The deed bears date in November, 1886, and the present bill was filed more than sixteen years afterward. The wife and children are the beneficiaries of the usufruct, during the life-time of John B., the husband. The deed is of that class which will open and let in after-born children, as beneficiaries under its provisions. The bill avers there were three children when it was filed, March 13, 1883: Sarah Alice, then over twenty-one years old, George B., between fourteen and twenty-one, and Robert W., under fourteen. So Robert W. must have been born after the deed was made, and George B. may have been. Forming our opinion on the averments of the bill it is not impossible that other

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children may be born, who will become beneficiaries under the deed. The deed, as we have seen, provides for the wife and children; support for all, and education for the children. The donor, as we said in *Hill v. McRae, supra*, had an individual right of property in the execution of the trust. To allow his dominion to be invaded would be a fraud on his generosity. The children were as much the objects of his providence and bounty as was their mother. He made greater provision for the children; for he provided for their education as well as their support. They were of tender years, some of them unborn. They required, and would require, the constant presence, watchful care and guardianship of their mother; and to deprive them of it, or hinder or embarrass it, would be to thwart the manifest purpose of the donor. That mother and children should be kept together as a family, supported in common as a family; that the children should be watched over, cared for and directed, with that tenderness which only a mother is expected to bestow, are as manifest on the face of the deed we are interpreting as words could express them.

We hold that in this case the meagerness of the provision, the number, condition and relationship of the beneficiaries, the impossibility of separating the fund without materially impairing the benefit intended for the children, demonstrate that the donor intended his bounty should be jointly used and enjoyed by the mother and children as a family; and that to separate her interest from those of the children would be practically to invade his dominion, and to commit a fraud on his generosity.

Affirmed.

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(23 Ala. 537.)

Records — public — right to examine.

The statutory provision that "the records of the judge of probate's office must be free for the examination of all persons, when not in use by him," and limited to any person having an interest, his agent or attorney, gives the right to take memoranda or copies; but it does not confer on attorneys, or other persons, who are engaged in the business of negotiating loans on mortgages of real estate, the right to make an abstract from the records of conveyances, of the titles to all the lands in the county, for future use in their business when required. (*See note, p. 764.*)

MANDAMUS. The opinion states the case. The writ was awarded below.

Brickell, Semple & Gunter, for appellant.

Troy, Tompkins & London, contra.

STONE, C. J. Relators set forth that they are resident citizens of the county of Montgomery, Alabama, and that they are copartners in the practice of law, and in negotiating loans to planters and others in said county on mortgages of real estate; that in the conduct of their business, in negotiating said loans, it becomes necessary for them to examine the records of Montgomery county, and to submit to the persons who are to make said loans abstracts of the titles of the property upon which mortgages are to be executed to secure the loans. Upon these grounds relators claimed the right of inspection of the entire records of conveyances in Montgomery county, and that they be permitted to make abstracts of all the titles to real estate in the county, to enable them to be in a position to submit them without delay to parties who are willing to make loans upon mortgages of real estate in said county. In other words, the demand was that they be permitted, not only to examine, but to make abstracts of the titles to all the lands in the county; not that their interest, or that of their clients, extended so far; but that they might be prepared, should future applications for loans be presented, to furnish abstracts of titles, without delay and without special examination in each case, as the case may arise. The judge of probate denied them the use of the records and of his office for such a purpose, and the present proceedings seek to compel him by *mandamus* to grant them the privilege claimed.

The right to relief is rested on section 698 of the Code of 1876. Its language is: "The records of the judge of probate's office must be free for the examination of all persons, when not in use by him."

Questions similar to the one before us have been heretofore considered by this court. *Brewer v. Watson*, 71 Ala. 299; *Phelan v. State*, 76 Ala. 49. We said: "It is not the unqualified right of every citizen to demand access to, and inspection of the books or documents of a public office, though they are the property of the public and preserved for public uses and purposes. * * * And the individual who claims access to the public records and

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documents, * * * can properly be required to show that he has an interest in the document which is sought, and that the inspection is for a legitimate purpose." Speaking, in another place, of the right of inspection, we said: "The qualification of the rule is, that no person can demand the right save those who have an interest in the record, their lawful agents or attorneys. * * *

Whether the right extends beyond the mere right of looking at the record, we have found no adjudged case that determines. It would seem however that no reasonable argument can be urged, why a person having an interest in the particular tract or tracts, should be denied the privilege of making, or having made, memoranda for his own use." This last point we did not then decide.

In Michigan there is a statute, containing this clause: "The registers of deeds in this State shall furnish proper and reasonable facilities for inspection and examination of the records and files in their respective offices, and for making memorandums or transcripts therefrom, during the usual business hours, to all persons having occasion to make examination of them for any lawful purpose." In *Webber v. Townley*, 43 Mich. 534; s. c., 38 Am. Rep. 213, this statute came up for interpretation before the Supreme Court of that State, at a time when CAMPBELL and COOLEY, JJ., were members thereof. The question was not distinguishable in principle from the one we have in hand. In a very strong argument by the chief justice, in which all the justices concurred, the prayer of the relators was denied. And the principle of the ruling was reaffirmed in *Diamond Match Co. v. Powers*, 51 Mich. 145.

Relators rely on *People v. Cornell*, 47 Barb. 329; *People v. Roiley*, 45 N. Y. 429, and *People v. Richards*, 99 N. Y. 620, in support of their views. Properly interpreted, they lend no aid whatever to the relief claimed in this case, as will be seen by an examination of them. The relief prayed in this case ought to have been denied.

We must not however be understood as intending to abridge the right, conferred by statute, of "free examination," by all persons having an interest, of the records of the probate judge's office. Nor will we confine this right to a mere right to inspect. He may make memoranda or copies, if he will, and to this end may employ an agent or attorney. The limitation is, that he must not obstruct the officers in charge in the performance of their official duties, by withholding records from them, when needed for the performance of an official function. Nor is this right of examination confined

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to persons claiming title, or having a present pecuniary interest in the subject-matter. It will embrace all persons interested, presently or prospectively, in the chain of title, or nature of incumbence, proposed to be investigated. The right of free examination is the rule, and the inhibition of such privilege, when the purpose is speculative, or from idle curiosity, is the exception.

The judgment of the Circuit Court is reversed, and a judgment here rendered quashing the relation and dismissing the suit at the cost of relator, in the court below and in this court.

Reversed and remanded.

Judgment reversed.

NOTE BY THE REPORTER.—The same doctrine was held in the Supreme Court of Kansas, October 8, 1887, in *Cormack v. Wolcott*. The court said:

"The statute under which plaintiff claims the right to make this examination of the records in question is * * * 'all books and papers required to be in their offices shall be open for the examination of any person.' * * * The plaintiff claims that the records in the office of the register of deeds are public records, that every person has a right to inspect, examine, and copy, at all reasonable times, and in a proper way, and that the register cannot deny access to his office or books for such purpose to any person coming there at a proper time, and in an orderly manner, and that the register must transact the business of the office, and allow persons reasonable facilities to exercise this right in that office. On the other hand, the defendant insists that while the records are public records, and all persons have a right to examine the records and books of that office at all reasonable times, yet this right is controlled to some extent by the objects for which the examination is made, or the use to be made of such information, and that as in this case, where the information is to be used for the purpose of private speculation and gain, solely for the benefit of plaintiff, for no public use or purpose, and not for the purpose of an examination of any title or interest of the plaintiff therein, and not as an attorney or agent of some person having an interest in lands; but solely for the purpose of selling said information to others for compensation and speculation, the privilege will not be granted.

"The question is an embarrassing one, and we are not free from doubt. At common law, parties had no vested rights in the examination of a record of title, or other public records, save by some interest in the land or subject of record. So no authorities at common law can throw any light upon the question; the practice of making abstract records being of more recent date. In some States the right has been recognized and regulated by law; in others, abstracts are made by permission of the register of deeds; but in this State no action of the legislature has been had. Then under the provisions of the statute above quoted, the right of the plaintiff must be found, if at all.

"The primary purpose of making and keeping a record of the titles to land is that the title and its history may be preserved and protected, so that the information there contained may be obtained by those who seek it. Without these records there would soon be that uncertainty in the title to real estate

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that would render it almost valueless, or involve its owner in endless litigation to protect it. Necessity then requires that these records shall be correctly made, and when so made to be safely and securely kept. The law has imposed this duty upon the register of deeds, and when any persons desire to inspect the same, that inspection must be under the immediate eye and observation of the register of deeds or his deputy. Otherwise that provision of the law that requires him to "safely keep" would impose a duty without the power to perform it. Then the right to inspect must of necessity have some restrictions, and must be done under such rules as the register may fairly impose, that will tend to the safety and preservation of his trust. The right claimed by the plaintiff for himself and for every person to inspect the records at will, and make copies therefrom, must of equal necessity be governed. If this right exists, it exists for all. If the plaintiff may make abstracts of the records and copies therefrom, then others have that same right. Should two or more desire to make an examination at the same time, who is to decide which shall make the examination or abstract first or the length of time to be occupied in making that abstract? With the right come things incidental to that right; facilities for making the copies desired. If no decision or direction is to be made, then each may pursue his work at the same time, and this must be done under the immediate observation of the register. He must either superintend and watch over this work, or furnish suitable deputies to do so. The records must be preserved and safely kept. If this construction was to be given, the public would be called upon to furnish greater facilities for the register of deeds and those desiring to make abstracts in his office, and a large expense would be incurred to carry on a work in which the public had no special interest or benefit; it would be enabling private individuals to engage in speculation for gain at the public expense. In large and populous counties the demand for the right to make abstracts would be great, and much time consumed in their making, and instead of having an office where the records were to be kept for public inspection, it would be converted largely into an office for private individuals, for private and not for public use, and if this right is granted, then could it be denied in any other department of county or State government? The records would be free to be inspected and copied for any and all purposes; for when the right is conceded for private use or inspection, then it is conceded to be equally open for him who examines for idle curiosity or unlawful purposes. If you grant this right to one citizen you must grant to another. No distinction can be made between the good citizen and the bad. Both must have the same facilities and the same right, independent of the purpose for which the information is sought.

"In *Buck v. Collins*, 51 Ga. 395, the court said: 'But no person has a right to examine or inspect the records of his office, except in his (clerk's) presence and under his observation. If he may do this for a minute, the clerk is not keeping them safely and securely. A blot or scratch may be made in a minute that may alter a record. A leaf may be abstracted in a minute, and if one man may of right take a record book, and abstract its contents, work a week upon it, any other man may do it. If a good, honest man has a right to do this, a bad man has the same right, and if this may be done except under the clerk's

immediate inspection, no record can be safely kept. If the complainant has the right to do what he claims, he has the right to keep the clerk's attention from minute to minute, from day to day, until his book is finished. He has the right to the service of the public officer for months together without pay; for not only the law, but every principle of propriety, requires that no person shall inspect the books, except under the watchful observation of the clerk.'

"The Supreme Court of Colorado, under a law that is identical with that of this State, has decided that the right of a person to examine the records is not open for all. The court in *Bean v. People*, 7 Colo. 202, says: 'We are of opinion that the statute in question was not designed to allow individuals, who wish to abstract the entire records for future profit in their private business, the privilege of using continuously the public property, and of monopolizing from day to day, for months and years, a portion of the time and attention of a public officer, against his will and without recompense.' The Supreme Court of Michigan has also decided this question, founded upon a statute much broader than ours. The court says: 'The right once conceded, there is no limit to it until every public office is exhausted. The inconveniences which such a system would engraft upon public officers; the dangers, both of a public and private nature, from abuses which would inevitably follow in the carrying out of such a right, are conclusive against the existence thereof. *

* * The language of the act referred to does not, in clear and unmistakable terms, include a case like the present, and such a one should not be conferred by construction. The object of the act was to enable persons, having occasion to make examination of the records for any lawful purpose, * * * to have suitable facilities therefor.' *Webber v. Townley*, 48 Mich. 584; a. c., 38 Am. Rep. 218.

"Our statute nowhere intends to give the right to permit the taking of copies of the records. The language is to 'make an examination.' That examination was intended for persons who desired some information that could be readily gained by personal inspection of the records. The duty of granting this right is imposed upon the register, but it was never intended that the inspection would give the right to make entire copies of the records, and consume his time in watching and protecting the records during the time required to take an abstract of the titles of lands in any county. This right of inspection would be exercised only by persons who had an interest in the record, or by some one of them, for the purpose of information, and was not intended to give a right to parties to engage in private speculation in connection with the information there received. The statute provides how copies may be obtained of all records, and prescribes fees to the various officers for furnishing those copies. Those desiring to engage in the abstract business can procure the information or copies as the law provides, and if upon examination the statute does not clearly provide for that class of information, or for copies, then the duty will be upon the legislature to provide it, and not upon the court.

"The plaintiff in error cites but two authorities in support of the right claimed by him. The first case cited is *People v. Richards*, 99 N. Y. 620. In that case there is a remarkable distinction from the one at bar. In that case

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the relator was a corporation created by a special act of the legislature of New York, and under that statute and charter the company was empowered and authorized to make, and cause to be made, and to procure and pay for such researches, abstracts, including maps and copies of records, as its trustees may deem necessary, and yet under this broad power granted to this company the court refused to grant the right, where the register of the city of New York had allowed the relator to put three men in his office, with accommodations for making copies of the records in his office. The petitioner claimed that considering the great number of records of the city, an abstract could not be made in a life-time by that company with the men permitted to work in the register's office, and to deny it greater facilities was to deny all the right granted by its charter. The court held in that case that the corporation could make such copies under such reasonable restrictions as the register might impose, and that the regulation imposed was reasonable.

"The next case was brought by McLean in the Circuit Court of the United States for the Southern District of Ohio, asking the court for an order giving the right to the inspection of certain fee-books and judgment docket of that court. The court refused the order, but afterward granted an order giving the right to inspection of certain records in accordance with the fourth rule of the Supreme Court of the United States, which rule provided for the right of inspecting certain records of the courts of the United States; the court laying down the rule that at common law the right to inspect records and judgments of courts in the United States existed only to the parties to the record, and those having an interest therein. *Re McLean*, 8 Rep. 818. Neither of these decisions can be relied upon as sustaining the right claimed by the petitioner."

See *Brewer v. Watson*, 71 Ala. 299; s. c., 46 Am. Reg. 818; *Ferry v. Williams*, 12 Vroom, 832; s. c., 32 Am. Rep. 219; *Brown v. County Treasurer*, 54 Mich. 182; s. c., 52 Am. Rep. 800.

The same was held in *Bean v. People*, 7 Colo. 200. The court said: "It matters not that relators require no aid from him; for he is charged by statute with the safe-keeping and preservation of the records, and is responsible for their truthfulness and freedom from mutilation. A single stroke of the pen, the erasure or addition of a single word, may change the character of a conveyance, or destroy the most valuable property right. The clerk is unfaithful to his trust if he allow one of the record books to remain for an instant in the hands of a stranger out of his sight. If he performs his whole duty he must watch, or employ an assistant to watch, each and every person who examines or abstracts a single title record.

"Did the legislature contemplate a business such as that of relators, and intend to impose upon the clerk these duties and responsibilities in connection therewith? Did they intend to say to him, 'you must give relators, gratis, a part of your time and attention on each and every week-day during your term of office?' If one person or partnership may subject him to this inconvenience, labor and annoyance, others may do the same; the abstract business is lawful, and in populous counties usually quite a number of individuals or firms engage therein. The clerk's entire time might be monopolized in this way, and yet he is allowed no compensation therefor.

" Our laws require the county commissioners to provide, at the expense of the county, an office for the recorder; to light and heat the same, and to furnish tables, chairs and all necessary appliances for the convenience and use of the recorder and of persons transacting therein the business contemplated by statute. Did the legislature intend to furnish, at public expense, office and desk room, together with tables and chairs, for the permanent use and convenience of persons engaged in a purely private speculative enterprise?

" It is urged that this business is a great public convenience and security, that parties interested may more readily and perhaps cheaply procure desired information and abstracts; and that in case of loss thereof by theft or fire, any portion of the records may be duplicated from the abstract office. It is answered that the clerk is required to furnish abstracts and information to those desiring the same, at a compensation fixed by legislative enactment; and that it is the duty of the commissioners to provide safes and vaults sufficient to protect the records from loss and injury by fire or burglary.

" We think that the business of relators should be treated as any other legitimate private enterprise. There is no law to prevent the clerk aiding them if he chooses so to do, either gratis or for a stipulated compensation; provided he does not neglect his official duties. But the court should not, by *mandamus*, compel him to do this against his will.

" We are of opinion that the statute in question was not designed to allow individuals who wish to abstract the entire records for future profit in their private business, the privilege of using continuously the public property, and monopolizing from day to day, for months and years, a portion of the time and attention of a public officer against his will and without recompense."

In *State v. Rachac*, Supreme Court of Minnesota, October 28, 1887, it was held that a statute giving the right of access to the public records "for the purpose of making or completing an abstract or transcript therefrom," extends to those who are in the business of furnishing abstracts of title. The court said: "These abstract offices, if properly conducted, are of great public convenience," but as the right of access for this purpose had been denied and resisted, the legislature amended the statute as above.

In *Hanson v. Eichetadt*, Supreme Court of Wisconsin, November 1, 1887, it was held that the right to make copies for furnishing abstracts exists under the statute, which directs registers to "permit any person so examining to take notes and copies," etc. The court reviewed and distinguished the authorities holding the contrary. It asks: "Under such a statute, can we say that where a respectable person, in a respectful manner, applies to the register to make such examination, etc., he is to be excluded merely because he does not belong to some class of persons unnamed and undefined in the statute; or if permission is given, is his examination to be confined to lands in which he or his clients have a present pecuniary interest?" And answers it in the negative. ORTON, J., dissented.

In *People v. Reilly*, 38 Hun, 429, it was held that a "title company," specially authorized by its charter to make searches, abstracts and copies of the public records, had the right to make any such copies as it chose for carrying on its business, under reasonable regulations of the register.

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GINDRAT V. MONTGOMERY GAS-LIGHT COMPANY.

(82 Ala. 596.)

Trustee — execution of power of sale.

When a trustee, having a power to sell lands with the assent in writing of the first *cestui que trust* for life, but no interest whatever in the property, joins with her and her children, subsequent *cestuis que trust* for life, in a conveyance of the property on valuable consideration, with covenants of warranty; this is a good execution of the power, although the conveyance does not mention or refer to it.

ACTION to recover lands. The opinion states the case. The defendant had judgment below.

Watts & Son, for appellant.

Sayre & Graves, Williamson & Holtzclaw, and Macdonald, Marks & Massie, contra.

SOMERVILLE, J. The first question we consider, as the one of controlling importance, is whether there has been a valid and sufficient execution of the power of sale conferred on John H. Gindrat, as trustee under the deed of trust executed by John Nickels on July 17, 1845. If so, this would cut off the interest of the plaintiffs as remaindermen under the provisions of that instrument and be fatal to their right of recovery in this action.

This deed is made in trust upon a recited valuable consideration, moving from the trustee to the grantor, (1) "for the sole and separate use, benefit and behoof of Sarah L. Gindrat," the wife of one John Gindrat and the mother of the trustee, during the term of her natural life; (2) at her death, in trust for her three children, Abram Gindrat, Mary Elizabeth Winter and William B. Gindrat, for and during the term of their natural lives; (3) at their death the premises conveyed to "vest in the heirs at law and children of them, the said Abram, Mary Elizabeth and William B., that may be living at the time of their deaths."

The clause of the instrument which vests in the trustee the power to sell is not absolute, but conditional, being in the following words: "Provided always, and it is expressly provided and agreed by and between the parties, that the said trustee may at any time, with

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the advice and consent of John Gindrat, the father of said Abram, Mary Elizabeth and William B., sell and dispose of any or all of said lots for cash or upon credit, as they may think proper; and it is further agreed and stipulated by and between the parties, that should John Gindrat die, leaving any portion of said trust property undisposed of in the hands of said trustee, then it shall be necessary for said trustee, before disposing of said property, to obtain the assent in writing of said *cestui que trust*."

What is meant by the phrase "said *cestui que trust*," and to whom is it intended to have reference? Does it refer to Mrs. Sarah L. Gindrat, the first beneficiary under the deed, who was primarily entitled for life to the usufruct of the property, with its rents and profits? or does it refer to the second life tenants and the remaindermen, all of whom may be ultimately beneficiaries, or *cestui que trust*?

[Omitting the consideration of this point, on which it was concluded:]

That after the death of John Gindrat, the consent of Mrs. Sarah L. Gindrat alone, properly expressed, was necessary to the execution of the power of sale vested in the trustee under the deed of trust in controversy.

We next proceed to inquire whether the deed made by Sarah L. Gindrat, John H. Gindrat, and others, on December 10, 1853, operated as a valid and sufficient execution of the power. There being in this deed no direct reference to the power, the question, which is one of intention, may be solved by implications, dependent on the words, acts or deeds of the party demonstrating such intention — by which is meant all relevant facts and circumstances illustrating or throwing light upon the matter. It must be made reasonably clear and manifest that the conveyance in question was intended as an execution of the power, and not otherwise. *Matthews v. McDade*, 72 Ala. 377. As said by Judge STORY, in *Crane v. Morris*, 6 Pet. 598, "it is sufficient if the power exists, and is intended to be executed; and that intent is matter *in pais*, to be collected from all the circumstances of the case." "The power," says Chancellor Kent, "may be executed without reciting it, or referring to it, provided that the act shows that the donee had in view the subject of the power." 4 Kent Com. 334.

The early English cases on this subject established a rule which so frequently operated to defeat the intention of grantors and testa-

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tors, as to require a decided departure from it, accompanied with frequent criticisms of its unsoundness by the most learned judges. In one case Lord ELDON was induced to declare, that he was "not sure the rule did not oblige the court to act against what might have been the intention nine times out of ten." *Nannock v. Horton*, 7 Ves. Jr. 398. In another case, an eminent vice chancellor said: "I must, although almost ashamed to say it, decide against what I firmly and sincerely believe to have been the intention of the testatrix, that the power of appointment has not been exercised. I am bound however by the authorities. I cannot help myself, and I must so decide." *Davis v. Thorne*, 2 De Gex & Sm. 347. So in another case Sir WILLIAM GRANT was forced, as a judge, to reach a conclusion which his judgment as a jurist repudiated. *Jones v. Tucker*, 2 Mer. 533.

The strictness of this rule, characterized by Sir Edward Sugden as one "distinguishing power from property," — that is the power to dispose of property from the technical right of property — has been repudiated by the modern cases, and there is now everywhere manifested by the courts a growing disposition to adopt a principle more liberal to the execution of such powers, and more just and certain in the ascertainment of the supposed intention relating to their execution. In *Blagge v. Miles*, 1 Story, 426, Judge STORY reviews the English cases, and adopting the rule recently referred to by this court in *Gosson v. Ladd*, 77 Ala. 224, 234, said: "Three classes of cases have been held to be sufficient demonstrations of an intended execution of a power: (1) Where there has been some reference in the will or other instrument to the power; (2) or a reference to the property, which is the subject on which it is to be executed; (3) or where the provision in the will, or other instrument, executed by the donee of the power, would otherwise be ineffectual, or a mere nullity; in other words, it would have no operation except as an execution of the power." Judge STORY thought there might be other cases embraced in the rule beside these three classes, and his view is sustained by the latter cases. *Funk v. Eggleston*, 92 Ill. 514.

There are several facts which under this rule seem to us to clearly demonstrate an intention on the part of John H. Gindrat, the donee of the power, to execute it.

1. He owned no title or interest in the property conveyed, which fact we must presume he knew; and the instrument nevertheless has reference to the specific property which was the subject of the

power. The case is thus made to fall within the second class of cases described in *Blagge v. Miles, supra*.^a We understand this class to embrace cases where the donee of a power, having no interest in certain property, or else an interest less than the whole, but having a power to appoint or convey the whole, undertakes to make such appointment or conveyance in fee simple, in compliance with his authority, but without reference to the power; for this is a reference to the property, as distinguished from his fractional or qualified interest in it, and the intention to execute the power will be implied. To use the language of Lord HARDWICKE, in *Caswell's* case, 1 Atk. 490, "he must do such an act as shows he takes notice of the thing he had power to dispose of." And in *Probert v. Morgan*, 1 Atk. 440, Lord HARDWICKE held, that where a man had "power to charge an estate," if he sufficiently described the estate, it would be bound, "especially where the person charging is the purchaser of the power." It is said in *Tiedeman on Real Property*, § 569, that "the courts have, of late years, so far relaxed the rule as to construe the instrument to be, by necessary intendment, a good execution of the power, if it cannot operate in any other way, notwithstanding the deed or will purports to dispose only of the individual property of the donee." And further "where the power is not coupled with an interest, if the donee has no property which he could dispose of by means of the instrument executed, it will be a good execution of the power, though neither the power nor the property was referred to." Mr. Washburn, in discussing this subject, says: "An inference as to the intention may be drawn from the character of the property of the donee of the power. If his property not subject to the power is so small, or of such a nature that the descriptions of the property in the deed or will are meaningless unless construed as applying to the property subject to the power, the deed or will will be construed as an execution of the power. Thus if one have a life-estate in land, and a power of appointment in fee, and conveys the fee, it is an execution of the power." 2 Wash. Real Prop. (5th ed.) 713. In *Bishop v. Remple*, 11 Ohio St. 277, it is said: "We think no instance can be found, where the property which is the subject of the power is distinctly described and referred to, and the disposition made of the property would fail, unless considered as made under the power, and there is no other objection to the mode of the disposition except the want of express reference to the power, that the execution of the power has been held to be invalid." *Baird*

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v. *Boucher*, 60 Miss. 329; *Yates v. Clark*, 56 Miss. 216; *Campbell v. Johnson*, 65 Mo. 439; *Funk v. Eggleston*, 92 Ill. 515, and cases there cited; *Munsen v. Berdan*, 35 N. J. Eq. 376; *Amory v. Meredith*, 7 Allen, 397; *Foss v. Scarf*, 55 Md. 301.

2. The deed in question purports, not to convey the mere life-estate of Mrs. Sarah L. Gindrat, and the other two beneficiaries who sign it, but it is a conveyance in fee for a valuable consideration, containing covenants of seisin and warranty, thus showing that the donee of the power and the other grantors intended to convey nothing less than a good and perfect title. In *Hall v. Preble*, 68 Me. 100, it was held, that a deed of general warranty, purporting to convey a fee, and made upon full consideration, would operate as an execution of the power, the court observing: "It is not necessary that there should be an express declaration in the deed that it is made in the execution of the power. It is sufficient if the deed purports to convey a fee. When a person conveys land for a valuable consideration, he must be held as engaging with the grantee to make the deed as effectual as he has the power to make it." The same rule is announced and followed in the following cases: *Campbell v. Johnson*, 65 Mo. 439; *South v. South*, 91 Ind. 221; *Orr v. O'Brien*, 55 Tex. 149; *Yates v. Clark*, 56 Miss. 212. As said by Sir WILLIAM GRANT, in *Bennett v. Aburrow*, 8 Ves. 609, the intention "may be collected from other circumstances, as that the will includes something the party had not otherwise than under the power of appointment; that a part of the will would be wholly inoperative, unless applied to the power." The purpose for which the realty in question was sold and purchased corroborates the intention of the deed to convey an indefeasible title. It was bought by a corporation, for the purpose of constructing on it a system of gas-works to be used in lighting a town, or future city, which itself implies the idea of a holding in perpetuity. If the execution of the deed therefore be not referable to the power, the manifest intention of the grantors, including that of the donee of the power, is defeated; but if construed to be so referable, every term of the instrument is satisfied.

3. The deed moreover is for a valuable consideration, and this is a fact of significance in its interpretation. Lord REDESDALE says: "When a person acts for a valuable consideration, he is understood in equity to engage with the person with whom he is dealing to make the instrument as effectual as he has power to make it;"

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and such is now the established doctrine of the courts. *South v. South*, 91 Ind. 221.

The above principles make it clear to our minds, that the deed in question was not intended to convey the mere life-estates of the beneficiaries, but was intended as an execution of the power of sale vested in the donee of such power, John H. Gindrat. The signatures of the others, purporting to be grantors, except that of Mrs. Sarah L. Gindrat, were probably attached from a superabundant caution, as is often done in such cases. It is not infrequent for persons who have contingent interests in land to sign instruments of this nature, as a further assurance of title, especially where warranties are required.

We hold that the power was sufficiently executed by the deed, if the consent of Mrs. Sarah L. Gindrat can be held to have been expressed in the manner required by law, she being, as we have seen, the only *cestui que trust* whose consent was at the time required to the execution of the power. This question depends on the construction of section 2215 of the Code of 1876, which was in force at the date of the deed and which reads as follows: "§ 2215. Where the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or must be certified in writing thereon; in the first case, the instrument, and in the second, the writing, must be signed by the party whose consent is required."

Was the signing of the deed by Mrs. Sarah Gindrat a substantial compliance with this requirement? We are of the opinion that it was. We have held that the deed itself showed a clear intention to execute the power vested in the donee — there being an express reference in the deed to the subject of the power, and its terms not being satisfied unless we infer the existence of such intention. This being true, an expression of consent to the deed itself, by signing it, was the best possible form of consent to the execution of the power, other than by direct reference to it. The statute does not, in our opinion, mean that the consent shall be ineffectual unless it expressly refers to the power. The deed may execute the power without such reference; and if the minds of the donee and of the third person whose consent is required concur in the intention, and the deed expresses it, the statute, we think, is satisfied. The law looks at the substance of things, rather than at forms or shadows. It is said, in full accord with this view, by Mr. Perry:

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“Where the required consent must be in writing, any writing signed by the party, implying his consent, will be sufficient, whether it is a deed or mortgage or other paper, by which his consent is given or implied.” 2 Perry Trusts, § 784.

We might add other reasons corroborative of the conclusion reached by us, that the power of sale vested in the donee, John H. Gindrat, was properly and legally executed, but we deem it unnecessary. The sale made by him, under the deed of December 10, 1853, operated to cut off the interest of the plaintiffs, conceding that their interest was a vested one, as to which there is much doubt.

Judgment affirmed.

CASES
IN THE
SUPREME COURT
OF
IOWA.

MALLORY V. RUSSELL.

(71 Iowa, 62.)

Marriage — dower — in partnership land.

Under a contract of partnership in land, providing for the purchase and sale of the land by a trustee, and for conversion of the land into cash before a settlement of partnership dealings, and not for a division of the land, *held*, that the wife of one of the partners got no dower right.*

PROCEEDINGS to enforce a dower right. The opinion states the case. The claim was denied below.

W. L. Cooper and J. W. Blythe, for appellants.

Thomas Hedge, Jr., and Jas. I. Gilbert, for appellee.

ROTHROCK, J. The defendant Cornelia Thayer is the widow of N. Thayer, deceased. In the month of September, 1871, said N. Thayer and one J. M. Forbes entered into a written contract of which the following is a copy:

“By this agreement the undersigned, Jno. M. Forbes and Nathaniel Thayer, of Boston, Massachusetts, have formed an association for the purpose of buying and selling land in the State of Iowa, and principally on the line of the branch of the Burlington & Missouri River railroad. This association shall be called the ‘Russell Trust.’ Each subscriber agrees to pay over to the agent

* See *Paige v. Paige*, *post*, 799.

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of said association the sum of six thousand four hundred and forty-five and 12-100 dollars, or as much thereof as may be required by the trustee hereinafter provided for, for the purchase of land for the association; which money shall be paid for in such installments as may be called for by the trustee. The legal title of the land purchased shall be placed in H. S. Russell, as trustee, to be held, managed and sold by him in trust for the benefit of all the parties subscribers hereto, each of said parties having an interest in all the properties and rights which may be acquired in proportion to the amount of his payments to the agent of the association. Said trustee and his successors shall have the right to bargain, sell and convey any and all the property of the association; which sale and business shall be done through and by Charles E. Perkins, of Burlington, Iowa, who shall act as the authorized agent or attorney in fact of said trustee. The death of any of the said parties subscribed shall not in any way affect the action of said trustee; but he shall become trustee for the legal representatives of such deceased party. The transactions and property of the association shall be wound up and closed within ten years from date, by auction sale or otherwise, unless all the parties subscribers hereto agree in writing to extend the time. It is understood that the trustee, as long as the details of the business are actually done by an agent, is not to charge for his services, nor is he to be responsible for any thing but ordinary care in transacting the business of the trust. It is further agreed that the said association and said trustee shall not contract or incur any indebtedness for or against the association aforesaid, but all property shall be purchased for cash in hand. The trustee shall keep a book, showing in detail the business of the association, describing the land bought and sold, the prices paid and received, taxes and all charges and expenses paid and incurred, and all other matters connected with the business of the association, which shall be open to the inspection of all the parties hereto. In case of the death, resignation, incapacity or refusal of said trustee to act, the members of the association may appoint his successor, by written agreement to that effect. A distribution of the receipts from land sales or otherwise shall, from time to time, be made by the trustee to the parties hereto, or to their heirs or assigns, in proportion to their respective interests.

“Witness our hands this first day of September, 1871.

[Signed]

“J. M. FORBES,

“N. THAYER.”

H. S. Russell accepted the trust created by said written contract. Business under the contract was carried on by the purchase and sale of lands; and in January, 1872, the said Russell, trustee, sold to the plaintiff the property in controversy, and executed to the plaintiff his warranty deed therefor, which deed was duly acknowledged and recorded. Prior to the sale to plaintiff, the trustee was in possession of the land under a warranty deed to him, and in receiving and conveying the title he acted under the trust created by the written contract. The plaintiff purchased the property in good faith for a valuable and full consideration, without any notice of any trust affecting the title, except such notice, if any, as would be implied by the fact that in the conveyance to plaintiff the name of the grantor, Russell, was followed by the word "trustee." The business of the association in the "Russell Trust" has not been wound up; but the trustee is continuing to buy and sell land thereunder, by and with the written consent of all the beneficiaries thereof. Said beneficiaries do not desire the affairs of said trust to be wound up, but to continue, and do not ask or desire an accounting between themselves, or between them and the trustee. The associates in the "Russell Trust" authorized and consented to the sale and conveyance to the plaintiff by said trustee, and said trustee has fully accounted to each party interested for his share of the purchase-money, and the association has no creditor except those persons to whom Russell, trustee, has sold lands, and executed his warranty deeds pursuant to the articles of association.

The foregoing is the substance of the agreed statement of facts. The Circuit Court held that the lands purchased by the partnership or association became personal property, so far as any rights therein might accrue to the individual members of the association. Appellant claims that the wife of the partner or associate became seized of an inchoate interest in the undivided estate, and that she could not be divested of this right, except by her own deed. It is true that under section 2440 of the Code, a wife is endowable in all "legal or equitable estates in real property possessed by the husband, at any time during the marriage, which have not been sold on execution or any other judicial sale, and to which the wife has made no relinquishment of her right." We think however that the defendant's husband was not possessed of any estate in the lands in question. The enterprise was a partnership, the object of which was to buy and sell real estate; and the interest of the indi-

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vidual members of the partnership was the proceeds of the sales of the land. The written contract expressly provides that the trustee shall be invested with the legal title of the land purchased, and the same shall be sold and conveyed by him, and a distribution of receipts from the land sales shall, from time to time, be made to the members of the association, in proportion to their respective interests. It was not contemplated that there should at any time be any partition or division of the lands among the members of the partnership; but the contract plainly provides that the lands shall be sold by the trustee, and the proceeds divided among the several partners. Being partnership land, it must be treated as personal assets, not only so far as the rights of creditors of the partnership are involved, but so far as necessary, for the purpose of carrying out the provisions of the partnership contract. It is plain to be seen, that if the claim of plaintiff be well founded, a husband could not become a member of a partnership of this character, without associating his wife with him as a member of the firm. It is not claimed that the contract of partnership is void. Contracts of partnership for buying and selling real estate as a business are as valid and binding upon the parties as any other legal contracts. The parties to this contract expressly provided that the title to the land should be held by a trustee, and that he should sell and convey a clear and absolute title. The contract itself rebuts the idea that persons who paid their money in aid of the enterprise became seised of any estate in the land. Their relation to the enterprise was very much like the relation of a stockholder in a corporation to the property of the corporation.

We are very clearly of opinion that the defendant is not entitled to any interest in the land. See *Hewitt v. Rankin*, 41 Iowa, 35.

Judgment affirmed.

STATE V. BOTKIN.

(71 Iowa, 87.)

Criminal law — ordinance — visiting disorderly houses.

A city ordinance which provides that "any person who shall be found in or frequenting any disorderly house shall be subject to a fine," is not void because it fails to use the word "unlawfully."

HABEAS corpus. The opinion states the case. The petitioner was discharged below.

James H. Detrick and Hugh Brennan, for appellant.

BECK, J. I. An ordinance of the city of Des Moines declares, that if the keeper of any store, grocery, saloon, etc., or other place, permit games of cards, dice, or other games of chance, to be played therein, he shall be deemed the keeper of a disorderly house, and shall be subject to fine. Another section of the ordinance is in these words: "Any person who shall be found in or frequenting any disorderly house, shall be subject to a fine." The police court of the city upon an information filed therein charging the petitioner, Reynolds, with the offense of being found in a disorderly house, found him guilty, and fined him, and committed him in default of payment of the fine. This imprisonment, he alleges in his petition, is illegal, and that he is therefore unlawfully restrained of his liberty. The District Court held that the ordinance was void, and that petitioner was therefore illegally restrained of his liberty.

II. The petitioner alleges in his petition that the city council had no legal authority to pass the ordinance. It appears that the District Court did not pass upon the question of the authority of the city to enact a proper ordinance to punish persons who were found in disorderly houses for unlawful purposes, but held that the section of this ordinance was void for the reason that it fails to prescribe, that to render one guilty of the offense prohibited, he should be unlawfully in the house when found there, and that under the language of the ordinance, one found in a disorderly house is guilty, though he be there for a lawful or innocent purpose. This position of the court below is clearly unsound, and in violation of familiar rules of construction and interpretation of statutes. The subject-

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matter, effect and consequence, and the reason and spirit of a statute must be considered, as well as its words, in interpreting and construing it. A statute intending to prohibit an offense will under these rules never be applied to an innocent and lawful act. The offense is prohibited, and not the lawful act. Hence if an act is done which is prohibited by the words of the statute, it may be shown to be lawfully or innocently done. The illustration of the application of these rules given by Blackstone are most apt, and are familiar to the profession. See Introduction to Commentaries, § 2, pp. 59-62. We need not consume time to repeat them. In support of these views see also 1 Bl. Com. 59, 62, 87 *et seq.*, and Potter Dwar. Stat. 208 *et seq.*

The court below thought, that as the ordinance imposes upon the accused the burden of showing his lawful presence in a disorderly house, it is void. But it is competent for the legislature to prescribe that an offense may be presumed from an act done. The ordinance in question, as we have seen, is intended to forbid unlawful presence in a disorderly house, and is to be so interpreted. The presence should be charged in the information as unlawful. As a defense, the person charged may show that he was lawfully or innocently in the house. These rules are of constant application in the administration of the criminal law.

[Minor matters omitted.]

We reach the conclusion that the District Court erred in discharging the petitioner from custody.

Judgment reversed.

HICKS V. FARMERS' INS. CO.

(71 Iowa, 119.)

Insurance — fire — condition against incumbrances — violation.

A condition in a fire-insurance policy, issued to a firm, that the property should not afterward be in any manner incumbered, *held*, violated by the execution of a mortgage by one of the partners on his undivided interest in the property, and by a judgment against him which became a lien on his interest.

ACTION upon a policy of fire insurance. The opinion states the case. Judgment for defendant below.

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*Gleason & Haskell and H. L. Dashiell, for appellant.**Frank C. Hornel, for appellee.*

BECK, J. The policy in suit contains a condition that it shall become void "if the property insured be sold, or any change take place in the title thereof, or if the property or any part thereof hereafter in any manner whatever become incumbered." The answer alleges that plaintiff, after the execution of the policy, and before the fire, incumbered the property insured by executing on his interest therein which was one-third, a mortgage, etc., and that it was incumbered during the same time by a judgment against plaintiff, which became and has remained a lien on the property. It is shown by the pleadings that the policy was issued to a firm of which plaintiff is a partner, and that the policy, after the loss, was assigned to him. The plaintiff demurs to the answer, on the ground that the mortgage and judgment, having been executed and rendered while plaintiff was one of the partners to whom the policy was issued, do not constitute a breach of the condition of the policy. The property insured was an office building and furniture therein. The answer alleges that plaintiff held a one-third interest therein, and that it was incumbered by the mortgage and judgment. Surely, under these allegations, defendant would be permitted to show both a mortgage and judgment incumbrance upon plaintiff's interest in the property. And that the mortgage and judgment, as they are set out in the answer, would incumber plaintiff's interest in the property, there can be no doubt. The petition alleges that plaintiff owned one-third of the property, and that the mortgage was executed upon that interest, and the judgment was rendered while he owned it. That liens were created as against the realty is very plain. Their extent or the manner of their enforcement need not be a subject of inquiry.

The case, in our opinion, was rightly decided by the court below.

Judgment affirmed.

Aulman v. Aulman.

AULMAN V. AULMAN.

(71 Iowa, 124.)

Assignment for creditors—what is not—conveyances.

The simultaneous transfer by an insolvent of all his property, by deeds and mortgages, to a part of his creditors, in satisfaction or security of their claims, does not constitute a general assignment for the benefit of creditors.*

FORECLOSURE. The opinion states the case. The defendant had judgment below.

Goode & Phillips, for appellants.

Cummins & Wright and *Barcroft & Bowen*, for appellees.

ROTHROCK, J. 1. Lorenz Aulman and George Aulman were engaged for several years in the foundry business, under the name of the Aulman Engine Works. About the first of December, 1885, they found that they were financially embarrassed and unable to meet the demands of their creditors, and unless relieved in some way from their embarrassment, they would be compelled to suspend business. They conceived the plan of organizing a joint-stock company and inducing their brother William and one Schwester to take stock in the venture and advance money sufficient to continue the business. This was not accomplished. Lorenz Aulman was the active business manager of the firm, and knowing that he could not discharge the liabilities, there were given to certain of the creditors of the firm the following instruments: To the plaintiff Theodore Aulman a chattel mortgage upon all the personal property of the grantors, including books of account and notes, and another mortgage to the same party upon certain real estate; one mortgage to Theodore Guelich upon certain real estate; a deed to Lena Rompano of certain real estate, and an assignment to William Aulman of a certain chattel mortgage held by the partnership against another party. These instruments covered all of the property of the partnership, and all the property of the individual members of the firm which was subject to execution or attachment. The instruments above enumerated were all executed on the 11th day of De-

* Compare *Winner v. Hoyt* (66 Wis. 227), 57 Am. Rep. 257.

ember, 1885, and filed for record two days afterward. They were all prepared by the same person and signed at the same time; and the evidence shows quite satisfactorily that they were all parts of a general design to secure the creditors to whom they were given. The defendants contend that these several instruments constituted a general assignment, and were void because they gave preference to certain of the creditors of the partnership.

It is provided by section 2115 of the Code that "no general assignment of property by an insolvent, or in contemplation of insolvency, for the benefit of creditors, shall be valid unless it be made for the benefit of all his creditors in proportion to the amount of their respective claims." It is not denied that an insolvent debtor may lawfully make such a disposition of his property as to entitle one or more creditors to a preference over others. This he may do by mortgage, or sale, or conveyance; and the fact that such mortgages, sales and conveyances embrace all of his property does not necessarily constitute the transaction a general assignment.

In *Van Patten v. Burr*, 52 Iowa, 518, it was held that a number of mortgages to creditors and an assignment may be taken as one transaction, and as constituting a general assignment. That case was determined upon a demurrer to the petition, in which it was alleged that the mortgages and the assignment were all parts of the same transaction, and were intended by the insolvent to operate as a general assignment for the benefit of creditors.

In *Fromme v. Jones*, 13 Iowa, 474; *Lampson v. Arnold*, 19 Iowa, 479; *Farwell v. Howard*, 26 Iowa, 381; *Kohn v. Clement*, 58 Iowa, 589, and *Gage v. Parry*, 69 Iowa, 605, and other cases, this court has held that the execution of mortgages by insolvent debtors, with the *bona fide* intention of securing particular creditors, does not operate as a general assignment for the benefit of creditors; and some of the cited cases hold that the execution of a general assignment for the benefit of creditors, within a very short time after the execution of the mortgages, cannot be considered part of the same transaction.

In the case of *Burrows v. Lehndorff*, 8 Iowa, 96, where several mortgages and deeds of trust were executed by a party in a state of insolvency, and covering all of his property, by which certain creditors were preferred to others, each instrument conveying the same property and reciting that it was subject to the prior conveyance.

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and all filed for record on the same day, five minutes time intervening between the filing of each, it was held that the transaction constituted, in legal effect, a general assignment, and was void. But in that case the mortgages and deeds of trust were executed by the insolvent without the knowledge of the creditors secured thereby, and it was not shown that the insolvent had creditors who were not secured in the manner above stated. One of the creditors repudiated the mortgage made to him, and attached the property of the insolvent. It requires two or more parties to make a lawful contract; and it appears that, in the cited case, the insolvent executed the mortgages and deeds of trust, and put them on record, without consultation with the creditors he intended to secure. Their relation to the transaction was the same as they would have had to a general assignment. It might well be held, upon such a state of facts, that the transaction was a general assignment.

The facts in the case at bar are quite different. The creditors secured by the mortgages and deeds were *bona fide* creditors. The evidence shows that from the time their debts were contracted it had been contemplated by the parties that they were to be secured. It is true that Lorenz Aulman, one of the insolvent partners, sought out the creditors, and offered the security. This was done by a personal interview with one of them, and by mail with another, and by telegraph with another. All of them assented to the arrangement, and accepted the security offered. The transaction is conclusively shown by the evidence to have been intended by the debtors as security to their creditors, and as is said in *Gage v. Parry, supra*, "they had the legal right to pay or secure any one or more of their creditors; and their right in this respect was not at all affected by the fact that they were insolvent. Nor does the fact that the whole of their assets was devoted to the payment or security of but a portion of the debts they were owing afford any ground of complaint to those creditors whose debts were unsecured." We think it is quite clear that the transaction cannot be held to be a general assignment.

[Omitting other questions.]

Judgment reversed.

ember, 1885, and filed for record two days afterward. They were all prepared by the same person and signed at the same time; and the evidence shows quite satisfactorily that they were all parts of a general design to secure the creditors to whom they were given. The defendants contend that these several instruments constituted a general assignment, and were void because they gave preference to certain of the creditors of the partnership.

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In the case of *Burrows v. Lehdorff*, 8 Iowa, 96, where several mortgages and deeds of trust were executed by a party in a state of insolvency, and covering all of his property, by which certain creditors were preferred to others, each instrument conveying the same property and reciting that it was subject to the prior conveyance.

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and all filed for record on the same day, five minutes time intervening between the filing of each, it was held that the transaction constituted, in legal effect, a general assignment, and was void. But in that case the mortgages and deeds of trust were executed by the insolvent without the knowledge of the creditors secured thereby, and it was not shown that the insolvent had creditors who were not secured in the manner above stated. One of the creditors repudiated the mortgage made to him, and attached the property of the insolvent. It requires two or more parties to make a lawful contract; and it appears that, in the cited case, the insolvent executed the mortgages and deeds of trust, and put them on record, without consultation with the creditors he intended to secure. Their relation to the transaction was the same as they would have had to a general assignment. It might well be held, upon such a state of facts, that the transaction was a general assignment.

The facts in the case at bar are quite different. The creditors secured by the mortgages and deeds were *bona fide* creditors. The evidence shows that from the time their debts were contracted it had been contemplated by the parties that they were to be secured. It is true that Lorenz Aulman, one of the insolvent partners, sought out the creditors, and offered the security. This was done by a personal interview with one of them, and by mail with another, and by telegraph with another. All of them assented to the arrangement, and accepted the security offered. The transaction is conclusively shown by the evidence to have been intended by the debtors as security to their creditors, and as is said in *Gage v. Parry, supra*, "they had the legal right to pay or secure any one or more of their creditors; and their right in this respect was not at all affected by the fact that they were insolvent. Nor does the fact that the whole of their assets was devoted to the payment or security of but a portion of the debts they were owing afford any ground of complaint to those creditors whose debts were unsecured." We think it is quite clear that the transaction cannot be held to be a general assignment.

[Omitting other questions.]

Judgment reversed.

STEWART V. WATERLOO TURN VEREIN.

(71 Iowa, 236.)

Statute — "persons" — corporation — penalty.

A corporation is a "person," subject to a penalty, within a statute prohibiting the sale of intoxicating liquors, and is liable for such a sale by its committee at a ball ordered by it.*

ACTION for a penalty. The opinion states the case. The defendant had judgment below.

C. W. Mullan, for appellant.

M. T. Owens and *J. L. Husted*, for appellee.

ROTHROCK, J. The cause involves less than \$100, and the appeal comes to us upon a certificate of the trial judge, from which it appears that the defendant is a corporation organized under the provisions of chapter 2, tit. 9, of the Code, which provides for the organization of "corporations other than those for pecuniary profit." The objects of the corporation are declared in the articles of incorporation to be "the intellectual and physical improvement of the members, by forming and keeping up a library, by establishing a school for instruction in gymnastic exercises, under such laws, rules and regulations as are now and shall be hereafter prescribed by said Waterloo Turn Verein, not in conflict with the Constitution and laws of the State of Iowa." Another provision of said articles of incorporation is as follows: "The said corporation may sue and be sued by and under its corporate name, and may purchase and hold both real and personal property, and sell and dispose of the same in and by its corporate name, and have and exercise all the powers and privileges which an individual person possesses and exercises, in the transaction of business, etc., under and by virtue of the laws of the State of Iowa." The business of the corporation is conducted by a speaker, a vice-speaker, treasurer, secretary, financial secretary, two teachers of gymnastics, librarian, and three trustees.

* So as to false pretenses, *Norris v. State* (25 Ohio St. 207), 18 Am. Rep. 291.

Stewart v. Waterloo Turn Verein.

At a regular meeting of said corporation, held February 14, 1884, it was resolved "to have a masquerade ball," and five members of the corporation were appointed a committee to provide for and take charge of said entertainment. The speaker of the corporation was one of this committee. The masquerade ball was held at Waterloo on the 26th day of February, 1884, at which ball two of said committee sold beer to a number of persons, and the sales were made with the knowledge of the speaker. The money received from the sale of the beer, with the other proceeds of the entertainment, was reported by the committee to the corporation at a subsequent meeting, and turned over to the treasurer of the corporation. No mention was made in the report of said committee, or otherwise, that any part of the proceeds so reported was derived from the sale of beer.

The questions certified as arising upon the foregoing facts are as follows: "(1) Whether the sale of beer by the members of said committee, at the entertainment aforesaid, to a person in the habit of becoming intoxicated, subjects the defendant to the penalty provided in section 1539 of the Code. (2) Is the defendant corporation a person within the meaning of said section 1539?"

Section 4326 of the Code contemplates that there are some offenses for which a corporation may be indicted and punished. It provides for process upon an indictment against a corporation, and it appears to be well settled that a corporation may be indicted and punished for a public nuisance, such as the obstruction of a public highway, a navigable stream, and the like. Wood Nuis. 783. The case at bar is not a criminal action prosecuted by indictment. It is in form a civil action for a penalty, and jurisdiction of the defendant is obtained by the service of an original notice as in a civil action. The penalty is a judgment for money. It does not involve imprisonment. There is therefore no obstacle in the way of the prosecution of an action against a corporation, the same as against a natural person. It is provided by subdivision 13 of section 45 of the Code that "the word 'person' may be extended to bodies corporate." This is laid down as a rule to be observed in the construction of the statutes of this State. It is apparent however that this rule cannot be of universal application, especially in the construction of criminal statutes, for the reason that there are some crimes for which a corporation cannot be punished. For example, if all the members of a corporation should be guilty of a criminal homicide in pursuance of a resolution of the corporation, the corpora-

tion would not be liable to indictment for the murder. The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute. *Wales v. City of Muscatine*, 4 Iowa, 302; *South Carolina R. Co. v. McDonald*, 5 Ga. 531.

Applying this rule to the case at bar, it is clear that a corporation is a person within the meaning of section 1539 of the Code. There is nothing therein which may not be applied as well to a corporation as to a natural person, and there is no more reason for claiming that a private corporation is not included within its provisions than there is in holding that such a corporation is a person within the meaning of the law authorizing attachment by garnishment, or any other provision of the statute equally applicable to natural and artificial persons.

It appears from the facts certified in this case that the corporation "ordered the ball." Its principal officer was one of the managing committee, and knew of the violation of the law, and the money arising from the sale of the beer was received by the corporation. Under these circumstances the evidence as to the participation of the corporation in violating the law was abundant. It was not necessary to prove that the beer was ordered and sold by an order of the defendant made in its corporate capacity. When a railroad company is indicted for a nuisance in obstructing a public highway in this State (a prosecution which is of frequent occurrence), it has never been thought necessary to prove that the obstruction was placed in the highway in pursuance of some resolution of the board of directors of the corporation. The corporation is liable for the acts of its agents and employees in such cases.

In regard to the liability of private corporations for violations of criminal laws, Mr. Morawetz, in his work on Private Corporations, employs this language (vol. 2, §§ 732, 733): "It follows therefore that a corporation cannot be charged criminally with a crime involving malice, or the intention of the offense. Even though the corporators themselves should unanimously join with malice aforethought, in committing a crime as a corporate act, yet the malice would be that of the several members of the company, and not actually one malicious intention of the whole company. There are however certain classes of crimes which do not depend upon the intention of the offender, and are not distinguishable from simple torts, except by the fact that in the one case an individual sues for

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damages on account of a private tort, and in the other case the State sues for a penalty on account of a public wrong. In these cases the crime consists of the act alone, without regard to the intention with which it was committed, and there is no difficulty in attributing an offense of this character to a corporation, since it may be committed entirely through the company's agents. Accordingly, it has been held that a corporation may be indicted for causing a public nuisance, for not performing a duty cast upon it by law, or for doing any act which is made indictable, without regard to the intention of the offender." The author cites many authorities in support of the text, and it appears to us that the principles therein laid down are so plainly correct as to command the approval of every legal mind.

Applying these principles to the case at bar, the conclusion is inevitable that the defendant is liable. The persons who sold the beer, and the officers and members of the corporation who stood by and acquiesced in the sales, were not actuated by malice. They doubtless believed that the beer gave zest to the ball, and added to the enjoyment of the entertainment. They had "malice towards none, but charity for all," and thought it no crime to dispense to the festive throng that which they believed to be exhilarating but not intoxicating.

We think both of the questions certified should be answered in the affirmative.

Judgment reversed.

FORT MADISON LUMBER COMPANY V. BATAVIAN BANK.

(71 Iowa, 370.)

Corporation — transfer of stock — attachment.

Where corporate stock is assigned, without the entry of the transfer on the books of the corporation, as required by statute, it is invalid as against attaching creditors of the assignor without notice.

ACTION for interpleader. The opinion states the point.

M. C. Ring, R. F. Knouts and Casey & Casey, for appellants.

C. W. Bunn, W. J. Knight and Van Valkenburgh & Hamilton, for defendants.

Frank Hagerman, for plaintiff.

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ADAMS, C. J. The question whether a transfer of stock in an incorporated company in this State, when not entered upon the books of the company, is valid, as against attaching creditors of the assignor without notice, is now presented for the first time in this court. Its determination must depend upon the view which should be taken of the meaning of the provision found in section 1078 of the Code, and which is as follows: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so as to show the name of the person by and to whom transferred, the numbers or other designation of shares, and the date of the transfer."

The question now presented does not arise between the parties to the transfer. Without any question, the transferee will hold the stock, as against the transferor, for all the purposes for which the transfer was made. The question arises between one of the parties to the transfer and others who were not parties, and who dispute the validity of the transfer. If we give the statute a literal construction, we must hold that the transfer is not valid. To hold otherwise, we should be obliged to enlarge the exception. The rule would be that the transfer is not valid, except as between the parties, and except as between the transferee and the attaching creditors of the transferor. But ordinarily, in the construction of a statute, an exception is not to be enlarged.

The question however is not free from difficulty. It is urged by the appellee, the transferee, that an attachment can in no case bind more than the interest of the debtor; and if the transfer is valid between the parties, it is said that it follows, from the necessity of the case, that the attaching creditor of the transferor acquires a lien only upon such interest as the transferor has left, if any.

That there is plausibility in this argument cannot be denied. But in our opinion it is not sound. It would carry us too far. It would make a transfer that is valid between the parties to it valid as against all persons claiming under the transferor. But no one pretends that this is so. If the transferor sells again, and to an innocent purchaser for value, who obtains a transfer upon the books, no one doubts that he would become both the legal and equitable owner; and this is true though the transferor had, in one sense, no interest in the stock which he could sell. It is entirely competent then for the legislature to provide arbitrarily that a given transfer shall be deemed by a court valid or invalid, accord-

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ing to the parties which shall be before the court. The transfer is valid if the parties before the court were the parties to the transfer, and otherwise not. This, at least, is the rule of the statute, and must be followed unless some equitable consideration controls. If the attaching creditors of the transferor had knowledge of the transfer, it may be that a court of equity would protect the transferee's rights. It has frequently been so held, but that question is not before us.

Our conclusion thus far has been based upon what seems to be the fair meaning of the language of the provision. But we are entitled to take a broader view and look at other provisions. It is provided in the same section that the "books of the company must be so kept as to show intelligibly the original stockholders, their respective interests, the amount paid on their shares, and all transfers thereof; and such books or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same." The above, it will be seen, is a provision that the books shall show, at any given time, precisely who the stockholders are at that time. The books too shall be kept open for inspection by any one. Where a provision is made for a record of specific facts, and another provision that the record to be kept open for inspection by any one, the intention must be that any one inspecting the record should be entitled to rely upon it as true; and if a person inspecting the record expends money upon the faith of it, any other person through whose negligence the record fails to show the truth should be estopped from setting up its untruthfulness.

It is contended by the appellee that the provision for a record, designed to show who the stockholders are at any given time, is for the sole benefit of the corporation itself. But there is nothing in the provision that calls for such construction. Besides, nothing can be clearer than that the record is for the benefit of any one who may desire to inspect it, because it is expressly provided for such.

It is contended by the appellee that a mere attachment of stock should not have preference over a prior assignment, not made of record, because the attaching creditor has expended nothing but his labor and the costs. By way of argument, it is said that an attachment does not take precedence of an unrecorded deed. But such a case differs in this: The statute expressly requires transfers of stock shall be recorded; it does not require that deeds shall be.

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Stock in an incorporated company is personal property. Transfers of personal property, to be valid as against attaching creditors, should be attended by a visible change of possession, or else evidence of the transfer should be spread upon a public record. We have an express provision of statute for property where a visible change of possession can be made. In the case of stock in an incorporated company, no visible change of possession can be made. Stock is a share in the interests and rights of the corporation. Certificates are mere evidence. They may never be issued. It is not essential that they should be. When issued, they are merely for convenience. The object of the imperative provision that transfers of stock shall be recorded unquestionably is that the ownership may be made apparent.

Chief Justice SHAW, in *Fisher v. Essex Bank*, 5 Gray, 373 (380), in speaking of stock in an incorporated company, said: "It is of importance that the title be certainly and easily ascertained, that the mode of acquiring and alienating it may at any time be made available by process of law for the debts of the owner." Again, speaking of the necessity of a record of the transfers as passing title, and of a levy according to the record, he says: "The shares (otherwise) could never be attached, for the officer could have no means of obtaining possession of the certificate from a reluctant debtor adversely interested, and without it the shares might pass the next day to a purchaser without notice." Again he says: "It is necessary to fix some act and some point of time at which the property changes and rests in the vendee, and it will tend to the security of all parties concerned to make that turning point consist in an act which, while it may easily be proved, does at the same time give notoriety to the transfer."

In support of the conclusion which we have reached, that the statute in question was designed in part for the benefit of attaching creditors, we will refer to another provision of the statute. The sheriff must, as nearly as the circumstances will permit, levy upon property fifty per cent greater in value than the amount of the debt as sworn to. Code, § 2954. Now if the construction contended for by the appellee is correct, the attaching creditor and sheriff, proceeding strictly according to law in attaching stock, and exhausting their ability to secure the debt by such attachment, cannot know whether any security at all has been obtained. The certificate holder may keep himself concealed until the very moment

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when the stock is offered for sale on execution, and it is sufficient if he then appear and give notice of his claim. We cannot think that the statute was designed to admit such a result. We may say indeed that the very mode of attaching stock provided by statute seems to be a legislative construction of the statute in question.

We come now to inquire how the question stands upon the authority of adjudicated cases.

In Maine the statute provides that "a transfer of shares is not valid, except between the parties thereto, until it is so entered in the books of the corporation." The provision is identical with the provision of our own statute. In *Skowhegan Bank v. Cutler*, 49 Me. 315, a question arose as to whether an attachment would take precedence of an unrecorded assignment, and it was held that it would.

In Illinois it is provided that shares of stock in a corporation can be transferred only upon the books of the corporation. In *People's Bank v. Gridley*, 91 Ill. 457, a question arose as to whether the levy of an execution would take precedence of a transfer of shares not entered upon the books. It was held that it would. The action was brought to enjoin the sale on execution. The point was made that the execution creditor, who had merely levied, was not an innocent purchaser for value, and that not being such, the transfer, though not entered upon the records, might be set up against him; but the court held otherwise. It is true, the Illinois statute differs a little from ours. It provides that transfers can be made only on the books of the company. It does not, like our statute, expressly provide that a transfer not entered upon the books will be good as between the parties to the transfer. But the difference, in our opinion, is not material. The statute is the same in effect. It is well settled that under a statute like the Illinois statute a transfer not entered upon the books is good between the parties. The case then appears to be strictly in point.

The same view was taken in *Sabin v. Bank of Woodstock*, 21 Vt. 353, and *Cheever v. Meyer*, 52 Vt. 66. In the former case, Chief Justice REDFIELD said: "We entertain no reasonable doubt that * * * all persons unaffected with notice to the contrary are at liberty to act upon the faith of the title being where it appears upon the books of the company to be." In *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507, Chancellor COOPER cites the case, and refers to it approvingly.

In Wisconsin the statute pertaining to the transfer of stocks is like ours, and in *Application of Murphy*, 51 Wis. 419, a construction was put upon it which sustains the appellants in the case at bar. The court said: "We think that the meaning of the law is that all transfers of shares should be entered, as here required, upon the books of the corporation; and it is equally clear to us that all transfers of shares not so entered are invalid as to attaching or execution creditors of the assignors, as well as to the corporation and subsequent purchasers in good faith."

In *Pinkerton v. Manchester & L. R. Co.*, 42 N. H. 424 (462), an attachment, made without notice of a prior transfer not entered upon the books, was held to take precedence of it. The court said: "As to goods and chattels in possession, a substantial change of possession is by our law essential when it can be had. In the case of stock, the natural and appropriate indication of ownership is the entry upon the stock record."

In Connecticut an attachment was upheld as against a prior assignment not entered upon the books. *Northrop v. Newton & Bridgeport Turnpike Co.*, 3 Conn. 544.

It is claimed by the appellee that in New York, New Jersey and California it has been held otherwise; and it may be conceded that this is so, though we are not prepared to say that all the statutory provisions in those States bearing upon the question are quite the same as in this.

The case of *Black v. Zacharie*, 3 How. 483, is cited by the appellee. In that case language was used which might seem to support the appellee's position, but the case was essentially different from the one at bar. The attaching creditors had notice of the assignee's rights at the time the attachment was levied.

The appellee also cites *Moore v. Walker*, 46 Iowa, 164. But the pretended attachment in that case was made before the assignment, and would unquestionably have taken precedence of it if it had been properly made; but it was not, and had no validity regardless of any question of transfer. It was expressly held that the provision of the statute now in question (§ 1078, Code) had no application to the case. The remark then in the opinion, in regard to the scope of that section, does not have the force of an adjudication.

There is no question in regard to the preponderance of authority. It is clearly on the side of the appellants. But we are not influenced more by this fact than what seems to be the plain language

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and intent of the statute and the difficulty and uncertainty which would often attend securing debts by attachment of stock, if stock, as against attaching creditors, can be transferred by mere delivery of the certificates, and if the books provided expressly for inspection by such creditors are to serve especially the purpose of a false scent.

We think the judgment must be reversed.

Judgment reversed.

BLANFORD V. MINNEAPOLIS AND ST. LOUIS RAILWAY COMPANY.

(71 Iowa, 310.)

Railroads — right to fence track in cities and towns.

A railroad corporation has no right to fence its track in cities and towns where it is intersected by streets and alleys.*

ACTION for double damages for a cow killed by a train on defendant's road. The opinion states the case. Judgment for the plaintiff below.

A. E. Clarke, for appellant.

Crooks & Jordan, for appellee.

SEEVERS, J. Certain facts were stipulated and agreed upon, among which were the following: "The plaintiff's cow, while at large in the streets of the incorporated town of Ogden, at a point where said town was platted and laid out in blocks, streets and alleys, was struck and killed by defendant's train, where the defendant's road crosses one of the lots of said town."

The amount in controversy being less than \$100, we are required to determine the following question: "Has a railroad corporation the right to fence its track and right of way when the same passes over and across a town lot or block, 264 by 574 feet, being a portion of the territory embraced in and within the corporate limits of an incorporated town which is laid out and platted in streets and blocks?"

* See *Grooley v. St. Paul, etc., Ry. Co.* (33 Minn. 186), 53 Am. Rep. 18, and note, 19.

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We are unable to determine from the facts stipulated and the foregoing question, whether the lot or block is all owned by one person, or by several, or whether the road crosses it for the distance of 574 or only 264 feet. We incline however to think it immaterial what the facts are in the respects mentioned. We will therefore assume that the lot in question is owned by one person, and that the road passes across it, at a right angle, for the longest distance mentioned. While this assumption is made, it is obvious that in some other case it may appear that the blocks are, say 250 feet square, divided into lots of twenty-five feet, each of which is crossed by the road for that distance, and each lot is owned by a different person. If this makes any difference, and each case must be decided according to the facts shown in the record, then it would seem to be a question for the jury, under proper instructions from the court, as to whether the right to fence existed; that is, whether the railroad company had such right. We however are asked to determine the question propounded as a matter of law, and such it has been assumed to be in numerous decisions of this court, and such we believe it to be, and such question we think may be stated as follows: whether a railroad company has the right to fence its track within the corporate limits of a city or town, outside of or beyond the switches and depot grounds, but within that part of the corporate limits where the track is intersected by streets and alleys. We assume that outside or beyond where there are any streets, and where the land is used for agricultural purposes, although within the corporation, the right to fence exists. *Coyle v. Chicago, M. & St. P. R'y Co.*, 62 Iowa, 518.

Assuming then that the question to be determined is correctly stated, it is immaterial whether the lot or block is crossed by the road for the distance of 250 or 600 feet, and whether it is owned by one or many persons. The real legal question is whether the right to fence exists within the corporate limits as above limited and defined. If it does, then cattle-guards must be constructed on both sides of each street and alley, for the reason that the fence would not prevent stock from getting on the track without such cattle-guards. *Mundhenk v. Central Iowa R'y Co.*, 57 Iowa, 718.

It is provided by statute that when a person owns land on both sides of a railway, the corporation may be required to construct a cattle-guard and causeway, and the corporation also is required to construct cattle-guards where the railway enters or leaves improved

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or fenced land. Code, §§ 1268, 1288. Does this statute apply to lots and blocks in towns and cities? As there are no restraining words, such a construction could be placed thereon with as much propriety as the theory adopted by the Circuit Court in relation to the right to fence. The corporation is not required to fence, but if it fails to do so it is absolutely liable for stock injured or killed. Code, § 1289.

There are no exceptions, and it is immaterial where the stock is injured or killed. But it is evident that the corporation does not have the right to fence across highways. There is clearly one other exception — it does not have the right to fence its depot grounds; and it makes no difference, we apprehend, whether such grounds are in a city or town, or not within either. *Davis v. Burlington & M. R. R'y Co.*, 26 Iowa, 549. The question under consideration was elaborately considered in the cited case, and while the precise question under consideration was not in that case, yet it is evident that it was in the mind of the court, and was considered. Among other things, it is said in the opinion: "The fitness or propriety of fencing a road, we need hardly say, depends upon circumstances.

* * * The legislature had in mind, beyond question, these lines as they were constructed over our prairies, knowing that cattle were free commoners, and desiring to protect stock running at large so generally in agricultural districts of the State." The opinion, as a whole, clearly conveys the impression that it was written with the view and intended to determine two other cases then pending, in which the facts were different. Those cases are *Rogers v. Chicago & N. W. R'y Co.*, 26 Iowa, 558, and *Durand v. Same*, 26 Iowa, 559. In the former, the following instruction was given: "That if the horse was killed in the town of Oxford, but not on the depot grounds, or within the switches, and not on any street crossing, and the road was not fenced, the verdict should be for the plaintiff for double the value." And an instruction embodying the proposition that the company would not be liable, under the statute, for failure to fence within the limits of the town situated and traversed by the road, as this was, being refused, there was a verdict for the plaintiff. The court said: "In principle, this case is 'on all fours' with that immediately preceding, *Davis v. Burlington & M. R. R'y Co.* The argument made we will not repeat. Following the construction there given of the statute, this judgment is erroneous."

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When the foregoing cases are carefully considered, we think it is evident that this court is committed to the rule that a railroad corporation does not have the right to fence its track in cities and towns where it is intersected and crossed by streets and alleys. The question we are required to determine must therefore be answered in the negative.

The Circuit Court saw fit to propound another question, and that in substance is whether the defendant is liable on the ground of negligence. Inasmuch as the court rendered judgment for double the value of the cow, this question is immaterial, and only presents for determination an abstract proposition, and therefore we are not required to consider it.

Judgment reversed.

BECK, J., dissenting. Under the decisions in this court, a railroad company may fence its track whenever it is "fit, proper and suitable" to do so, and the right rests upon the public convenience, the public interest, and not upon the convenience of the railway company. This rule has been applied by this court to cases wherein was involved the right to fence depot grounds and a strip of land adjacent to a railroad track, "designed to afford room for teaming and driving" on each side of the track. *Davis v. Burlington & M. R. R'y Co.*, 26 Iowa, 549; *Rogers v. Chicago & N. W. R'y Co.*, 26 Iowa, 558.

This court has not held that a railroad company has not the right to fence its track within the limits of a town or city, when the public interest and convenience do not prohibit it. *Gilman v. Sioux City & P. R'y Co.*, 62 Iowa, 299, and *Coyle v. Chicago, M. & St. P. R'y Co.*, 62 Iowa, 518, are claimed by counsel to so hold, but they are not to that effect.

The mere fact that a lot, containing nearly four acres (the lot in question being that size) is within a town or city, does not authorize the conclusion that the interest and convenience of the public does not demand that a railway running through it should not be fenced. Indeed it may be that a fence, in such a case, is more urgently demanded by the public good than in case of farming lands away from towns and cities. It will be observed that the facts shown by the question submitted in this case disclose that the railroad runs "over and across" the town lots, not upon a street or road adjacent thereto. The foregoing opinion, while admitting

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that the rule it approves has not been held by this court, declares that it was in the "mind" of the court, and therefore recognized in *Davis v. Burlington & M. R. R'y Co.*, 26 Iowa, 549. We cannot fathom the "mind" of the court in order to determine the rule of law decided, nor can we consider the arguments advanced in the discussion by the court in order to determine the point decided. We look to the facts, and if we discover that the point was not in the case, whatever is said about it is not to be regarded as a decision; it is mere *dictum*. The foregoing opinion admits what is true,—that the question before us was not in the case cited; it is therefore no authority in this case.

A doubt may well be expressed as to whether the point in controversy in this case was "in the mind" of the court in the case cited, and whether any arguments found in it support the conclusion reached in the foregoing decision.

REED, J., concurs in this dissent.

PAIGE V. PAIGE.

(71 Iowa, 518.)

Partnership—lands deeded to partners—resulting trust—parol evidence—dower rights of administrator.

Where real estate is purchased by a firm, with partnership money, and for use in the partnership business, but is deeded to the partners in their individual names, *held*, (1) that it belongs to the firm; that the individual partners only hold the title in trust for the firm; and that such trust may be shown by parol testimony; (2) that after the death of a partner, the firm and the partners all being insolvent, the widow of the deceased partner is not entitled to dower therein.*

ACTION for dower. The opinion states the case.

Bills & Block, for appellants.

Davison & Lane and Stewart & White, for appellee.

ROTHROCK, J. I. The property in controversy is certain real estate in the city of Davenport, upon which there is situated a saw

* See *Mallory v. Russell*, ante.

mill, planing mill etc. It is known as the "Davis Saw Mill Property," and was formerly the property of John L. Davis, deceased, who owned the same at the time of his death. On the second day of February, 1880, F. H. Griggs, the administrator of Davis, conveyed the real estate in controversy to said Simon B. Paige and John A. Paige. There is no question about the validity of this conveyance. By its terms it is a conveyance to the two grantees as individuals, and if the deed alone were to be considered, it would appear that Simon B. Paige and John A. Paige each owned the undivided one-half of the property; and as there is no dispute that the plaintiff was the lawful wife of Simon B. Paige at the time of his death, it would follow that she is entitled to dower in the undivided half of the property. But the defendants claim that the real estate was not the individual property of the grantees in the deed, and that it was part of the assets of a partnership of which said grantees were members, and that said partnership was insolvent when Simon B. Paige died, and that all of the property of the partnership would be insufficient to pay its indebtedness.

It is not disputed that there was a partnership of which the said grantees in the deed were members, and that said partnership was insolvent when Simon B. Paige died. The ultimate question in the case then is, was the real estate in question partnership property? If it was, the plaintiff is not entitled to dower. If it was the individual property of Simon B. Paige and John A. Paige, the plaintiff is dowerable therein. In order to a proper consideration of this question, it is necessary to recite certain facts which appear in the record.

It appears that for a number of years prior to the purchase of the property in question Simon B. Paige and John A. Paige had been engaged in business in partnership, under the firm name of "S. B. & J. A. Paige." For some sixteen years they were engaged in the general merchandizing business. Afterward they operated in pine lands, getting out timber and pine saw logs. They were so engaged up to the time of the death of S. B. Paige, and their place of business was at Oshkosh, Wisconsin. They purchased the property in controversy, and took the conveyance therefor, on the second day of February, 1880. The evidence shows that at the time of the purchase a new partnership was in contemplation, which firm was to operate the saw mill, planing mill, etc., so purchased, and on the sixth day of February, 1880, written articles of partnership were executed, by which S. B. and J. A. Paige and R. F. Paige and

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E. W. Dixon associated themselves as partners, under the firm name of Paige, Dixon & Co. The following is a copy of the agreement for a partnership:

"Articles of agreement made this sixth day of February, A. D. 1880, between S. B. & J. A. Paige, of the city of Oshkosh and State of Wisconsin, party of the first part, and R. F. Paige and E. W. Dixon, of the city of Davenport, State of Iowa, parties of the second part, witnesseth that both parties, having formed a co-partnership under the firm name of Paige, Dixon & Co., each of the four named persons having equal interest in the profit and losses in the business to be conducted by said firm, said business being the manufacturing of lumber, timber, shingles and lath in the mill known as the 'Davis Mill,' and in said city of Davenport and State aforesaid. It is hereby agreed to by the said R. F. Paige and E. W. Dixon, of the second part, together and each by himself, that in consideration of the party of the first part agreeing, and do hereby bind themselves, to sell and deliver to each of the aforesaid R. F. Paige and E. W. Dixon, by quit-claim deed (free of encumbrance arising from any act of the said S. B. & J. A. Paige) of an undivided one-fourth part of said Davis Mill property, when each of them separately shall have paid to the party of the first part the one-fourth part of the sum of thirty-six thousand ten and sixty-five one-hundredths dollars (\$36,010.65), which, being for the costs of said property, \$32,250, and for insurance on the same, \$660.50, with expenses paid in making the purchase of said property, \$100.15, making in all the said sum of \$36,010.65, together with interest from the second day of February, A. D. 1880, at the rate of eight per cent per annum, interest payable annually; that they, the said R. F. Paige and E. W. Dixon, are to give their entire time and service to the business aforesaid, and for the benefit of the firm of Paige, Dixon & Co., without any compensation during the continuance of said firm. The said S. B. & J. A. Paige are to receive no compensation for any services they may render to said firm, or for expenses when making voluntary visits from Oshkosh to Davenport, but such times as working up, examining and purchasing logs they shall be paid all expenses of travel and otherwise, and same shall be charged up to expense account of said firm of Paige, Dixon & Co.; and the expenditure of any considerable amount of money, also the purchase of any considerable amount of logs, shall be left to the decision of the said S. B. & J. A. Paige, as also all

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matters of importance; and the said R. F. Paige and E. W. Dixon are each privileged to draw out from the moneys and credits of said firm of Paige, Dixon & Co., for the purpose of expenses only, a sum not exceeding one hundred and fifty dollars per month; and at the expiration of one year from said second day of February, A. D. 1880, that the total amount so drawn out by each of said R. F. Paige and E. W. Dixon shall be deducted from his one-fourth interest in the net profits of the business of said firm of Paige, Dixon & Co. for said term, and the remaining part shall be paid to said S. B. & J. A. Paige, until each, the said R. F. Paige and the said E. W. Dixon shall have paid in full his one-fourth part of the said thirty-six thousand ten and 65-100 dollars (\$36,010.65), together with interest as aforesaid; and it is further agreed by both parties that said mill shall be kept in as good repair as it is now in, and that on or before it is set to running there shall be not less than ten thousand dollars (\$10,000) more insurance put upon the said mill, and continued on the same, in the name of S. B. & J. A. Paige, the expenses thereof to be paid by the said firm of Paige, Dixon & Co., who also are to pay all taxes and all expenses of whatever kind and nature during the existence of said firm of Paige, Dixon & Co., and the same to be charged to the expense account of said company; and at the expiration of the insurance now upon said mill property, the firm of Paige, Dixon & Co. are to insure the same for a like amount, which is fifteen thousand dollars (\$15,000) on mill and contents, the insurance to be in the name of S. B. & J. A. Paige, the expense thereof to be paid by the firm of Paige, Dixon & Co.; and at no time shall the insurance be less than twenty-five thousand dollars (\$25,000), so long as it remains the property of said S. B. & J. A. Paige; and also it is agreed by said R. F. Paige and E. W. Dixon that the said firm of Paige, Dixon & Co. shall carry at all times a good and sufficient amount of insurance upon all manufactured lumber, shingles, lath and timber, so fast as it is made and accumulates. All expenses of selling, of entertaining customers, and any expenditures of money for the benefit of carrying on the business shall be charged in the expense account of Paige, Dixon & Co.

"In witness whereof we have hereunto set our hands and seals.

"S. B. & J. A. PAIGE. [Seal.]

"R. F. PAIGE. [Seal.]

"E. W. DIXON. [Seal.]"

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We have set out the foregoing agreement for a partnership *in extenso*, for the reason that it appears to us to have an important bearing upon the main question in the case. The resident members of this partnership took immediate possession of the property, and operated the mills, and expended a large amount of money of said partnership in making improvements thereon. In August, 1881, said R. F. Paige died. An administrator was appointed, and the personal estate of said decedent being insufficient to pay his debts, upon proper application being made to the Circuit Court, the administrator was ordered to sell, and did sell, to Simon B. and John A. Paige the interest owned by said decedent in said real estate under the articles of partnership above set out. After the death of R. F. Paige, the business was conducted under the same firm name, S. B. and J. A. Paige having three-fourths interest and E. W. Dixon a one-fourth interest, and it so continued until the death of Simon B. Paige. The plaintiff was married to the deceased within a month or two before his death. The partnerships of S. B. & J. A. Paige and Paige, Dixon & Co., and all of the individual members thereof, were insolvent at the date of the death of S. B. Paige.

The parol evidence in the case shows quite conclusively that at the time the conveyance of the property was made, S. B. Paige stated that the purchase was made by the partnership of S. B. & J. A. Paige, and the property belonged to the partnership, and he desired the deed to be made in the name of the partnership; but that under the advice of counsel, it was made in the individual names of the members of the firm, so that if the property should be subsequently sold it would not be necessary to prove who were the proper parties to join in a conveyance.

This evidence, and all of the other parol evidence tending to show that the property was purchased and paid for by the partnership, is objected to by counsel for the plaintiff, upon the ground that a written conveyance of real estate cannot be varied by parol. It is insisted that such evidence is incompetent, under the statute, which provides that "conveyances to two or more, in their own right, create a tenancy in common, unless a contrary intent is expressed." Code, § 1939. And the following provisions of the Code are also relied upon: Section 1934: "Declarations or creations of trust or power, in relation to real estate, must be executed in the same manner as deeds of conveyance; but this provision does not

apply to trusts resulting from the operation or construction of law." Sections 3663 and 3664 provide that no evidence of any contract for the creation or transfer of any interest in lands (except leases for a term not exceeding one year) shall be competent, "unless in writing, signed by the party to be charged."

Appellant concedes that if the property had been paid for with partnership money, and one of the partners had taken the title to the whole, there would be a resulting trust for the benefit of the firm. But it is claimed that as each received the legal title to just the share he was equitably entitled to, there can be no resulting trust. The evidence in the case shows quite satisfactorily that payment for the property was made, not with the money of each individual partner, but with the undivided money of the partnership. It seems to us it is wholly immaterial whether the conveyance was made to one or both of the partners. The law recognizes the partnership as a person distinct from the individual members of the firm, and this person or partnership having paid its money for the property, there was a resulting trust in its favor, no matter in whose name the title was taken.

In the notes to *Coles v. Coles*, 1 Am. Lead. Cas. (Hare & W.) 487, it is said: "If land is bought with partnership funds, and is brought into the business of the firm and used for its purposes, it will be considered as partnership stock, in whose name soever the legal title may be, unless there be distinct evidence of an intention to hold it separately, such as an express agreement in the articles of copartnership, or at the time of the purchase, or the fact that the price is charged to the partners respectively in their several accounts with the firm; for such arrangements would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust; but the mere circumstances that the conveyance was to them expressly, as tenants in common, would not of itself be sufficient to rebut the trust."

In 2 Story Eq. Jur., § 1207, it is said: "Where real estate is purchased for partnership purposes and on partnership account, it is wholly immaterial, in the view of a court of equity, in whose name or names the purchase is made and the conveyance taken,—whether in the name of one partner, or of all partners; whether in the name of a stranger alone, or a stranger jointly with one partner. In all these cases, let the legal title be vested in whom it may, it is in equity deemed partnership property, not subject to

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survivorship, and the partners are deemed the *cestui que trust* therefor."

This court has frequently held that where land is purchased with partnership funds, and intended to be used for partnership purposes, it is to be treated as personal assets of the partnership. *Evans v. Hawley*, 35 Iowa, 83; *Hewitt v. Rankin*, 41 Iowa, 35, and other cases. In such case the trust is not an express one, but is implied, or results from the operation or construction of the law, and is within the exception named in section 1934 of the Code, and such a trust may be shown by parol evidence. *York v. Clemens*, 41 Iowa, 95; *Cotton v. Wood*, 25 Iowa, 43; *Fairchild v. Fairchild*, 64 N. Y. 471.

The cases of *Hale v. Henrie*, 2 Watts, 143; s. c., 27 Am. Dec. 289; *Kramer v. Arthurs*, 7 Penn. St. 165, and *Ridgway's Appeal*, 15 Penn. St. 177, hold that "where partners intend to bring real estate into the partnership, their intention must be manifested by deed or writing placed on record, that purchasers and creditors may not be deceived." This rule is doubtless correct, so far as the rights of innocent purchasers without notice are involved; but this court is committed to the doctrine above announced, that a purchase of real property with partnership funds, and investing the title in a person or persons other than the partnership, creates a resulting trust in favor of the partnership, and the facts necessary to establish the trust may be shown by parol.

The evidence that the property involved in this case was paid for by the firm of S. B. & J. A. Paige is clear and satisfactory. It consists of the declaration of S. B. Paige, made when the deed was executed, and the recitals in the articles of partnership entered into within a few days after the deed was made, and the subsequent acts of both of the grantees in the deed in the management and use made of the property.

[Minor points omitted.]

We unite in the conclusion that as it is conceded that both of the partnerships and all of the surviving members thereof are insolvent, the plaintiff is not entitled to a dower interest in the property in dispute.

Judgment affirmed.

STATE V. CENTRAL IOWA RAILWAY COMPANY.

(71 Iowa, 410.)

Railroads — aided by taxation — obligation to operate — effect of foreclosure.

A railroad company, aided in the construction of its road by taxation of a township at one terminus of its proposed route, may be compelled to construct, maintain and operate its road to that point, and on a foreclosure sale of the road and the company's franchise, the purchaser incurs the same obligation.

PROCEEDING to compel operation of a railroad. The opinion states the case. The plaintiff had judgment below.

J. H. Blair, Anthony C. Daly and S. K. Tracy, for appellant.

A. J. Baker, attorney-general, A. R. Anderson and Smith McPherson, for appellee.

ROTHROCK, J. The material facts in the case are not in dispute. They are as follows:

The Central railroad of Iowa was organized as a corporation on the 23d day of June, 1869. The object of the corporation, as declared in its charter or articles of incorporation was "to acquire, construct, maintain and operate a railroad, from the south to the north line of the State of Iowa, beginning at the State line of Missouri, at or near the terminus of the North Missouri railroad, and running thence north, on the sixteenth meridian of longitude west from Washington, or as near thereto as practicable." A railroad was constructed from Albia, in Monroe county, north, through the cities of Oskaloosa, Grinnell, Marshalltown, Eldora and Mason City, to Northwood, the county seat of Worth county, which last-named place is within a few miles of the north line of the State. The road was constructed, and the cars running thereon, to Northwood, in October, 1871. The said railroad company became insolvent, and its creditors placed its road and other property in the hands of a receiver, and in May, 1879, the road and its franchises were sold upon a decree of foreclosure. The defendant, the Central Iowa Railway Company, was the purchaser at the foreclosure sale. This company was organized in May, 1879. In its articles of incorporation the object of the corporation was declared to be "to acquire, construct, equip, maintain and operate a railway from the

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north to the south line of the State of Iowa, embracing the road and property, both real and personal, of the Central Railroad Company of Iowa."

The road of the Burlington, Cedar Rapids & Northern Railroad Company, successor to the Burlington, Cedar Rapids & Minnesota Railroad Company, is a line of railroad constructed and operated from the city of Burlington, in a northerly direction, through the cities of Cedar Rapids, Vinton, Waterloo and Cedar Falls, to a junction with the line of the Central Iowa railroad at Manly Junction, about eleven miles south of Northwood. In the year 1877, and while the Central road was under the management of the receiver, he made a contract with the Burlington, Cedar Rapids & Northern Company, by which both of said companies run their trains over the line from Manly Junction to Northwood, to the same depot. The Burlington, Cedar Rapids & Northern Company constructed a road from Northwood to the north line of the State, and on to Albert Lea, there connecting with another line to St. Paul, Minnesota. The last named company, by this joint running arrangement, was thus enabled to operate through trains from Burlington to St. Paul. It has ever since that time operated through trains between the points named, using the road from Manly Junction to Northwood as part of the line. Both roads continued to use and operate that part of the line between the points last named until the year 1881, when they entered into a written agreement by which the Burlington, Cedar Rapids & Northern Company took full possession of the road from Manly Junction to Northwood, as lessee of the Central Iowa Railway Company. By the terms of this lease the lessee agreed to pay \$14,000 per year to the lessor as rent, and to keep the road in repair, pay all taxes and assessments upon that part of the road, and to have the exclusive use of the same for twenty-five years. Exclusive possession was taken by the lessee under this agreement, and since it was executed such possession has been retained, and the Central Iowa Company has not since that time run its trains north of Manly Junction.

In the year 1870, at a special election held in the township in which Northwood is situated, a tax of five per cent upon the taxable property was voted to aid the Central Railroad Company in constructing its railroad through said township. The tax, amounting to \$12,608, was collected and paid to the company. There were also certain lands at Northwood conveyed to the company for

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depot purposes, by private parties, for which no money consideration was paid. A conveyance of certain alleged swamp lands was made by the county to the company, but as the company took no lands of any value by the conveyance, this alleged aid to the road demands no consideration.

The proceedings in the case at bar originated before the railroad commissioners of this State, under chapter 133 of the Laws of 1884. The people of Northwood made complaint to the commissioners, and the defendants herein were cited to appear, and such proceedings were had that on the 13th day of February, 1883, the said commissioners ordered and adjudged "that the Central Iowa railway is under legal obligations to equip, maintain and operate its road from Manly Junction to Northwood, and to do so as a part of, and in connection with its entire and continuous line between Albia and Northwood; and that a failure to so equip, maintain and operate the portion of the road between Manly Junction and Northwood, and its entire road, is a violation of its charter duties and obligations, and contrary to law." The Central Railroad Company refused to comply with this order, and this action was brought to compel obedience thereto.

The statute above cited provides that the rulings, orders and regulations of the railroad commissioners, for the direction and guidance of railroad companies in this State, may be enforced by proper decrees, injunctions and orders in the District Court, and that the proceedings therefor shall be instituted by the attorney-general in the name of the State. Said act further provides that "if the court shall find that such rule, regulation or order is reasonable and just, and that in refusing compliance therewith, said railway company is failing and omitting the performance of any public duty or obligation, the court shall decree a mandatory and perpetual injunction, compelling obedience to and compliance with such rule, order or regulation." * * *

The ultimate question to be determined in this case is this: Has the Central Iowa Railway Company the legal right to lease that part of its road from Manly Junction to Northwood, and surrender the exclusive use of it to another company and cease to operate its line north of Manly Junction? It is not claimed in behalf of the plaintiff that the defendant had no legal right to lease its line of road, and we fail to discover why such a lease would not be valid. If the whole line were leased and operated by another company,

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the integrity of the line would be preserved, and the people of Northwood would have the same means and facilities for transportation from one end of the line to the other as if the owner of the road should retain possession of it and operate it. But the complaint is that by the lease and surrender of part of the line Northwood is practically deprived of the use of the whole line of road, because it is in effect situated some eleven miles north of its northern terminus. The question to be determined is one of very great importance. It involves the rights of railroad companies to lease parts of their roads and thus destroy or break up a continuous road and deprive localities of the benefit of competing lines; and whether a sale of a railroad under a decree of foreclosure releases the purchasing company from the obligations and liabilities which its predecessors owed to the public, and what are the rights of the public in such cases.

Railroad companies have the undoubted power to mortgage their property (*Dunham v. Isett*, 15 Iowa, 284), and as we have said, the power of a railroad company to lease its whole line of road is not questioned. Indeed the power to lease is expressly given by section 1300 of the Code. We come then to the question whether the Central Iowa Railway Company had the power to lease the part of its line involved in this controversy. And it is proper, at the outset, that some general principles applicable to the relation between the State or sovereignty and corporations be stated. A corporation is created by legislative power. It can have no power to do any corporate acts without legislative authority, and its power and authority are limited to such acts as are expressly given to it by its charter, or such as are necessarily implied from the powers expressed. Formerly, corporations were chartered by special act of the legislature. Now they are incorporated under general laws, which with the articles of incorporation adopted by the incorporators, create the same relation between the State and the corporation which would exist if the general laws applicable to the corporation and the articles of incorporation were embodied in a special act of the legislature creating the corporation, and defining its powers. A railroad corporation differs in some important respects from private corporations in general. It cannot acquire the right to construct its road over private property, against the will of the owner, without an exercise of sovereign power. Eminent domain is an attribute of sovereignty, and when a railroad company condemns land

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for right of way upon which to construct its road, it is not the act of an individual. It is the exercise of sovereign authority, and the corporation is the agency through which the State executes the power. And this State authorized towns, cities and townships to vote taxes to railroad companies to aid in the construction of their roads. This also was an exercise of sovereign power. It is true the power was not exercised by railroad corporations. But the law authorized taxes to be voted by the legal voters upon all the property in their towns and townships, and those who voted against the tax, and the owners of property who were not voters, were required to pay the tax voted upon them.

The people of Northwood voted the tax, collected and paid it to the railroad company, to the end that they might secure the benefits of the line of road then being constructed by the Central Railroad Company. They did not extend this aid for the building of a line through their township alone. It cannot be admitted that they would have been willing to aid in the construction of a railroad having its beginning and ending in their township without any connection with any other railroad. It claimed however that this is a mere private controversy between the people of Northwood and the railroad company; that no public right is involved, and that the voting of a tax did not create any contractual relations between the tax payers and the railroad company, and we are cited to *Railway Co. v. Horton*, 38 Iowa, 33; *Trust Co. v. Davis County*, 6 Kan. 257; *Railway Co. v. Kenton*, 12 B. Monr. 144 (150), and other cases. But these were all cases brought to enforce the levy or payment of taxes, or the issue of bonds in pursuance of a vote of the people. It may be admitted that no contract exists between the people and the railroad company; but when taxes are voted, collected and paid to the company, and it has thus availed itself of public aid from taxation, it assumes a relation to the public of a higher and more sacred character than a mere contract between private individuals. It would be at war with every principle of natural justice to hold that it might avail itself of this public aid, and then violate its obligations to the public incurred by reason of the aid thus received.

It is insisted by counsel for appellants that the authority given by section 1300 of the Code to any railroad company, to sell or lease "its railway property and franchises," includes the power to lease any part of the line, upon the principle that the power to lease the whole includes the power to lease a part. We think this does not

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follow. If a lease of a part of the line is a breach of a just and binding obligation to the public, the lease would be illegal. It may be assumed that the Central Railroad Company was not bound to construct the road. A railroad corporation is under no legal obligation to construct a railroad because of its articles of incorporation. Its charter is not a contract with the State to build a railroad. *People v. Albany & Vt. R. Co.*, 24 N. Y. 261. But having constructed and put in operation its road, in part at least, by public aid in the way of taxation, the right to abandon or rather turn over part of its line to another company, to the injury of any locality on the line, is quite another question. We do not undertake to determine the question whether under the mere charter rights of the corporation, to build and operate its road, the corporation may abandon part of its line, or lease it to another company, so as to destroy competition at points on the line. There appears to be a conflict of authority upon this question. See *Black v. Canal Co.*, 22 N. J. Eq. 410; *Com. v. Fitchburg Ry. Co.*, 12 Gray, 180; *State v. Hartford & N. H. Ry. Co.*, 29 Conn. 538; *Peoria & R. I. Ry. Co. v. Coal F. M. Co.*, 68 Ill. 489. It would seem from some of these authorities, and others cited by counsel, that a corporation may abandon its line, and cease to operate it for good and sufficient cause; and in the case where the business of a railroad will not pay operating expenses, it would be a most unjust rule to require it to be operated by proceedings in *mandamus*. But that question is not necessarily in this case. The Central Railroad Company was the recipient of more from the public than the mere right of invoking the power of the State to condemn land for a right of way. It received taxes from the public, levied and collected to aid in the construction of the road. Its relation and obligation to the public are therefore different from that of a company not having received any such aid. It appears from chapter 118, of the Laws of 1876, that it was contemplated by the legislature that the obligation to operate a railroad is incurred by accepting taxes in aid of its construction. That act in effect provides, that upon a proper proceeding, a railway line may be changed or removed, but upon the condition that all such taxes shall be repaid. It is true, the act applies to such railroads only as were constructed prior to the year 1866, and probably is not applicable to the road in question. But the act indicates that the legislature regarded the obligation to operate the road, as contemplated by the company when it accepted the aid, as binding upon it.

II. We come now to another question in the case, and that is, whether this obligation to operate the road passed with the foreclosure sale, and became binding upon the defendant to the same extent as against its predecessor. In other words, did the Central Iowa Railway Company take the road by its purchase charged with the duty of operating it to Northwood? Counsel for the defendants strenuously insist that by the purchase the defendant acquired the road clear and free from any such claim. It is to be remembered that when the decree of foreclosure was entered, and the road sold, and the sale approved, and the property conveyed, the old company was, for all practicable purposes, wiped out of existence. With the sale of its road, right of way, depot buildings, side tracks, and all the appliances necessary to operate the road, the franchise, or right to operate the road, passed with the sale. It is true, the purchaser took the road unincumbered by the debts of the old company. But the obligation to operate the road to Northwood was more than a debt. It inhered in the franchise, so to speak, and pertained to the right to operate the road. It did not pass by an assignment proper; it passed to the grantee as a burden or limitation upon the right to operate the road. *Campbell v. Marietta & C. R. Co.*, 23 Ohio St. 168.

Without further elaboration, our conclusion is that the Central Iowa Railway Company had no power to execute the lease, and thus abandon the part of its line in controversy, and compel its former patrons at Northwood to transport passengers and freight some eleven miles to reach the terminus of a railroad which the defendant was bound to maintain at Northwood. We think that the order of the railroad commissioners, which was approved by the District Court, was "reasonable and just," and should be complied with. It will be understood that we do not determine that a contract providing for a joint running arrangement over that part of the line from Manly Junction to Northwood would be illegal. It is the surrender by the Central Railway Company of any right to operate the line, and giving the exclusive right to the Burlington Cedar Rapids & Northern Railway Company to operate it, that we hold to be authorized by law.

Judgment affirmed.

SEEVERS, J., dissenting. When the State granted to railroad corporations the right to mortgage their incorporate property, it clearly was contemplated that the mortgages might be foreclosed,

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the property sold, and purchased either by a natural person or another corporation. This being so, what does the purchaser obtain at the sale? Without doubt, I think, he gets the mortgaged property, and the right to operate the road. Unless he obtains the latter, the property would be comparatively valueless, and the right to mortgage a barren, instead of a substantial right. In my judgment, the purchaser obtains a perfect and absolute title to the mortgaged property, except against valid and existing liens of record, or of which the purchaser has express notice.

It is not claimed, in the foregoing opinion, that the tax, or any right or obligation growing out of it, constituted a lien on the mortgaged property. Nor is it claimed that the acceptance of the tax created a contract of any kind between the corporation executing the mortgage and the State, or any citizen thereof. In my judgment, the right to mortgage not only exists, but may be exercised freely by the corporation, as its interest may dictate. The corporation may execute a mortgage on a part of the road at one time, and afterward upon another part. Upon the foreclosure of such mortgages, the road may be severed, and thereafter adversely operated. This was the case with the Des Moines Valley road. When the purchaser obtains a railroad under a foreclosure and sale under a mortgage, he may use and control it as he sees proper, unless he is prohibited from so doing by some statute, and I do not understand that it is claimed there is such a statute. On the contrary, the statute provides that the owner may lease the road. This necessarily includes the power to lease the whole or a part, unless the owner has entered into some contract or assumed some obligation to the public or individuals which prevents him from so doing. In this case the existing corporation entered into no such contract or obligation. It is a separate and distinct corporation, organized under the statute, and exists independently of the prior corporation. It therefore cannot be said to have assumed an obligation of the prior corporation, of which it had neither express nor constructive notice. This it seems to me must be true, in the absence of a statute which either expressly or by necessary implication so provides. In my judgment, the District Court erred in entering the decree it did.

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CONNORS V. BURLINGTON, C. R. & N. RAILWAY COMPANY.

(71 Iowa, 480.)

Negligence — contributory — brakeman out of place — action — personal injury — immediate death.

A railroad brakeman is not necessarily guilty of contributory negligence by merely being in the engineer's cab instead of at his brakes.

Under a statute providing that "all causes of action shall survive notwithstanding the death of the party entitled or liable to the same," an action lies for negligent personal injuries resulting in instantaneous death.

ACTION for death of plaintiff's intestate. The opinion states the case. The plaintiff had judgment below.

Bowman & Swisher, for appellant.

S. K. Tracy and *J. C. Leonard*, for appellant.

REED, J. It is alleged in the petition that the train on which the intestate was employed was thrown from the track as it approached the station of Northwood, at a point where a switch or side track connects with the main track, and that he was killed in the wreck; also that there is a sharp curve in the track at that point. It is charged that the track was rendered dangerous by the curve and the connection of the switch at that point, and that the company was guilty of negligence in constructing and maintaining it in that condition; also that the engine drawing the train was new and stiff, and difficult to control when making a curve, and that this was known to the engineer in charge, but that he was running it at a dangerous rate of speed at the time, and at a much higher rate of speed than was allowed by the rules of the company. And it is alleged that the injury was caused by these acts of negligence.

The jury found specially that the accident was caused partially by the curve in the track, and partially by the rate of speed at which the train was being run at the time, and that the engine had frequently passed over the curve; also that the deceased had been running as a brakeman over the part of the road where the accident occurred for one month; that his place of duty at the time of the accident was at the brakes, but that he was riding in the cab; and

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that no one on the train, except those who were riding on the engine, was injured in the accident; also that he was instantly killed.

[Minor matters omitted.]

The facts found are that deceased was riding in the cab at the time of the accident, while his place of duty was at the brakes, and no person on the train was injured except those who were riding on the engine. It will be observed that the findings do not determine that the accident would have been prevented if the deceased had been at his post of duty, and had applied the brakes. Neither do they determine that he would not have been injured if he had been at the brakes instead of on the cab; nor that the position in the cab was ordinarily more dangerous than the one at the brakes. All that is determined is that he was away from his post of duty, and that he was injured while in that position by an accident which was caused by the negligent manner in which the train was being run over a defective or dangerous track, and that no person on the train was injured except those who were at the said place.

The question to be determined is whether these facts defeat the right of recovery. We think they do not. It cannot be said, as matter of law, that he was negligent. If he had, by going upon the cab, exposed himself to a known or obvious danger, and had been injured in consequence of such exposure, the case would have been very different. But it does not appear that he was exposed while in the cab to any known danger which he would not have been exposed to if he had remained at the brakes; or if his presence at the brakes had been necessary for the proper government of the train, and the accident had been occasioned by his absence from his post of duty, a different question would arise. But that does not appear. Very clearly, we think, it cannot be said that his act was negligent, unless some consideration of duty or prudence demanded that he should have been at some other place than the one in which he was when the accident occurred. Neither did the act contribute to the injury. The immediate cause of the injury was the derailment of the train, and that was caused by the manner in which it was being run, and the condition of the track. His presence in the cab neither caused nor contributed to the result.

The case differs from *Player v. Burlington, C. R. & N. Ry Co.*, 62 Iowa, 723. The plaintiff in that case was a passenger on a freight train. His proper position was in the "caboose;" but instead of going into it, he got upon a box car, and while in that

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position the car was thrown from the track by the negligence of the defendant, as was alleged, and he was injured, and it was held that he could not recover. As the company had furnished a safe and convenient car for the passenger to ride in, but he chose, for purposes of his own, to ride on another part of the train, the injury was the result of his own act. He could very properly be said to be guilty of contributory negligence. But the facts of this case do not bring it within that rule.

II. It is next contended that as the intestate was instantly killed, a civil action cannot be maintained for the injury. The position is that under the common law there is no civil remedy for an injury which produces the death of a human being, and while this rule is modified to some extent in this State by statute, yet the statute goes no further than to afford a right of action to the one who sustains the injury if he survives it, which survives, and may be brought or maintained by his representatives after his death.

The statutes bearing on the questions are sections 2525, 2526 and 2527 of the Code, which are as follows: "All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same." "The right of civil remedy is not merged in a public offense, but may in all cases be enforced independently of and in addition to the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, or child, or parent, it shall not be liable for the payment of debts." "The actions contemplated in the two preceding sections may be brought, or the court on motion may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representatives or successors, at the same time it did to the deceased, if he had survived. If such is continued against the legal representatives of the defendant, a notice shall be served on him as provided for service of original notice."

We will concede that the rule of the common law is as claimed by counsel. We are of the opinion however that the rule has been entirely abrogated by our statute. For many years before the enactment of the present Code, a statute was in force in this State which provided, in express terms, that "when a wrongful act produces death, the perpetrator is civilly liable for the injury." Revision

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1860, § 4111; Code 1851, § 2501. When the present Code was enacted, the section in which that provision was contained was repealed, and the sections quoted above were enacted in lieu thereof. As appears, the language of this provision is not contained in any of them. But we think the effect of these provisions is the same as though that express language had been retained. The doctrine that "in a civil court, the death of a human being could not be complained of as an injury," appears to have been first laid down by Lord ELLENBOROUGH in *Baker v. Bolton*, 1 Camp. 493. That was a *nisi prius* case, but the doctrine was adhered to by the English courts until it was abrogated by statute. It has also been followed quite generally by the courts of this country. See *Carey v. Berkshire R'y Co.* and *Skinner v. Housatonic Ry. Co.*, 1 Cush. 475; s. c., 48 Am. Dec. 616; *Green v. Railway Co.*, 2 Keyes, 294; *Eden v. Railway Co.*, 14 B. Monr. 165.

It has been denied however by at least one distinguished American judge, that it is capable of vindication, or that it is so deeply rooted in the common law as to be binding on the courts of this country. *Sullivan v. Union Pac. R'y Co.*, 3 Dill. 334. When we look into the cases however in which the doctrine has been held, to ascertain the ground of the holding, we find that the reasons for the rule are (1) that the right of civil remedy, when the wrongful act amounts to a felony, is merged in the public offense, and (2) that the injury to the person being a personal tort, the right of action determines with his death. Relief was denied then in this class of cases, upon grounds of supposed public policy, rather than upon considerations as to the rights and liabilities of the parties. The provisions of the statute quoted above expressly abrogate both of these reasons. Section 2525 provides that the cause of action shall survive notwithstanding the death of the party, and section 2526 enacts that the right of civil remedy does not merge in the public offense, but may be enforced independently of, and in addition to the punishment of the latter. This express abrogation of the reasons of the rule necessarily carries with it the rule itself. The case on its actual merits stands as it always did. A wrongful act has been committed, which was injurious to another. But the grounds upon which a civil remedy was denied have been abrogated, and there now exists no reason for a denial of that right.

SEEVERS, J. Being unable to distinguish this from the *Player* case, I dissent from the foregoing opinion. ROTHROCK, J., concurs in this dissent.

Judgment reversed.

Davidson v. Hawkeye Insurance Company.

DAVIDSON V. HAWKEYE INSURANCE COMPANY.

(71 Iowa, 582.)

Insurance — forfeiture for sale — executory.

A fire insurance policy, conditioned to be void upon a sale of the premises, is avoided by a contract of sale under which the purchaser takes possession, although it provides that it may be forfeited by non-payment of the deferred payments, and although it has been abandoned.

ACTION on a policy of fire insurance. The opinion states the case. The defendant had judgment below.

Guthrie & Maley, for appellant.

Phillips & Day, for appellee.

ADAMS, C. J. The court gave a peremptory instruction to render a verdict for the defendant. The plaintiff assigns as error the giving of such instruction. The instruction was given upon the theory that the pleadings and evidence showed conclusively that the plaintiff had violated the policy, and forfeited his rights thereunder, before the loss. The policy contained a condition against selling, conveying or incumbering the property. The defendant contended that the plaintiff violated the condition by entering into a contract of sale, by which contract the purchaser took possession, and the plaintiff received a part of the purchase-money, and retained the legal title, which was to be conveyed upon the payment of the balance. The making of such contract is not denied. The plaintiff however denies that the contract was of such a character as to constitute a completed sale.

The building insured was a dwelling-house situated upon a small farm in Polk county. After the policy was issued, to-wit, in March, 1885, the plaintiff and one Lint entered into a written contract whereby Lint was to pay the plaintiff for the same \$400, of which \$50 was to be paid down, and the balance in six payments, the first one of which was to be made January 1, 1886. Lint took possession under the contract, and leased the farm to his son, who cultivated it, and occupied the house as a dwelling until it was destroyed by fire. The contract of sale provided that, if Lint should promptly make all the payments called for by the contract, the plaintiff would

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execute to him a deed of warranty to the land, but that time should be regarded as of the essence of the contract, and that if Lint should fail to make any payment at the time stipulated, the contract should be void, and any payments made should be forfeited. Before the first deferred payment became due, the insured property was destroyed.

The precise language of that portion of the policy which is alleged to have been violated is in these words: "In case any such property shall be sold, conveyed or incumbered * * * without the written consent of this company is obtained * * * this policy shall immediately thereafter be null and void." It is manifest from the above that the policy contemplated that there might be a sale without a conveyance. The provision is the same as if the word "or" had been expressed between the words "sold" and "conveyed," and as if the policy read: "In case any such property shall be sold or conveyed," etc. In either case the policy would be void. We come then to the question as to whether where one party binds himself unconditionally to pay a certain price for a piece of real estate, and takes possession under the contract, and the other party binds himself to convey the real estate upon the payments being made, and nothing remains to be done but for the party taking possession to make the payments, and for the other to make the deed, such contract constitutes a sale of the real estate, within the meaning of the policy. In answer to this question we have to say that we think it does. Lint was the real owner of the house that was burned. The loss was his loss. The plaintiff lost nothing, unless he needed the house for security. If Lint is responsible, or the property, without the house, is sufficient security for the balance of the purchase-money, the plaintiff's claim can be collected, and he will have all that he would have had if the house had not been burned. If he is allowed to collect the insurance and the purchase-money both, he will profit by the destruction of the property. That the insured shall, by his own voluntary act, come to have an interest in the destruction of the insured property is forbidden, not only by public policy, but by all the maxims of insurance, and is precisely what this defendant attempted to guard against. If the contract had been of that nature that the loss of the house fell upon the plaintiff as owner, and not upon Lint, the case would be entirely different. We can suppose a case where the owner of insured property makes a contract for the sale of it, but has not made a conveyance of the property, nor

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delivery of possession, but has retained control, and while under his control and care the property is destroyed by fire, and the seller cannot complete the contract by making such delivery as the contract contemplates, then the loss of the property would fall upon him, notwithstanding his contract, and for the reason that he is not able to carry it out; and it might well be said in such case that there was no sale within the meaning of the policy.

The plaintiff relies in part upon the fact that in the contract time was made of the essence of the contract. But that was a mere provision for its termination. The seller might elect to reclaim the property if the buyer failed to pay promptly as he stipulated; but while the contract subsisted it appears to us that the relation which each party sustained to the property was not different from what it would have been if the contract had been drawn without the provision as to forfeiture if the payments were not made upon the day they fell due. Until forfeiture Lint was the owner of the property, in the sense that the loss of the house must fall upon him.

The plaintiff cites *Kempton v. State Ins. Co.*, 62 Iowa, 83, and several other cases. But those cases all differ from the case at bar. In those cases something yet remained to be done by the vendor in addition to the execution of the deed.

We are aware that reasoning is used in some of the cases which might seem to support the plaintiff's position. Take the case of *Trumbull v. Portage Mut. Ins. Co.*, 12 Ohio, 305 (314). In that case the court said: "This case turns mainly on the question as to whether the plaintiffs had an insurable interest in the premises insured at the time the loss occurred." Now it is not to be denied that any vendor of real estate who has not received full payment and retains the legal title for security has an insurable interest. But it does not follow, we think, that there cannot be a sale of real estate where the legal title has not been conveyed and a part of the purchase-money remains unpaid. The very theory that the vendor who retains the legal title, with a right to enforce the payments of the purchase-money, holds the legal title for security, is based upon the idea that there has been a sale; and in such cases it is manifest that a loss by fire must fall upon the purchaser as owner, and affects the seller only as it impairs his security. The seller may indeed have an insurable interest, but his interest is substantially that of a mortgagee, which is quite different from a proprietary

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interest. Different rates are charged; and in case of the insurance of a mortgage interest, and payment to the mortgagee of a loss, a right of subrogation accrues to the company to the extent of the amount paid. The law will not allow an insured mortgagee to be subjected to the temptation that he would be subjected to if he had a right to collect his insurance and at the same time to collect and hold his whole mortgage debt besides.

There is a fundamental and vicious error in the doctrine contended for by the plaintiff. He would collect the insurance upon the theory that there has been no sale, and would collect his purchase-money upon a theory which is just the reverse. If the doctrine for which he contends is correct, he would be able to collect the full amount of his policy, though only a single dollar of the purchase-money remained unpaid.

II. The plaintiff assigns as error the exclusion of certain evidence. He offered to prove that only a part of the payment was made, which by the terms of the contract was to be paid at the time it should take effect. The court excluded the evidence as immaterial. It was of course the right of the plaintiff to insist upon the whole of that payment, or that the contract should not take effect. But the contract provided that time was of the essence of the agreement, and that all payments made might be forfeited if the buyer made any default. Now the plaintiff could not be allowed to accept partial payment, and say at the same time that the payment being partial the contract is void and the partial payment thus made is forfeited. The very act of accepting partial payment was a waiver of strict performance as to the balance of that payment. No other theory would consist with good faith. The acceptance, to be sure, was not a waiver of the payment of the balance, and the plaintiff, unless there was an agreement to the contrary, might probably demand it at any time. But after accepting partial payment, we think that the plaintiff should have demanded the balance before he could properly claim that Lint was in default. We think that the contract took effect, and that the contract, together with the delivery of possession, constituted a sale.

III. The plaintiff assigned as error the exclusion of other evidence. He offered to show that before the loss the parties had abandoned the contract, but the court excluded the evidence as immaterial. If the policy had been forfeited by the making of the contract, we do not think that we could hold that it would be

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waived by an abandonment of the contract. Suppose that the plaintiff had forfeited the policy by a sale and conveyance, no one would, we think, claim that the policy would be revived by a repurchase and reconveyance. Yet the principle involved would be the same.

We see no error in the ruling of the Circuit Court.

Judgment affirmed.

REED, J., dissenting. The contract between plaintiff and Lint was an executory agreement for the sale and conveyance of the property. Plaintiff was bound on the strict performance by Lint of his undertaking, to convey the land. But a failure by the latter to pay any installment of the purchase-price at the stipulated time would work a forfeiture of all interest in the land, as well as of all sums paid under the contract, and the agreement provided that upon such failure the vendee would surrender possession of the premises. What was the extent of the right and interest acquired by Lint under this contract? I think he did not acquire the ownership of the property, but the right acquired was the right to be invested with the ownership when he performed his undertakings in the contract. Until that was done, both the title and ownership remained in plaintiff, for by the terms of the agreement, Lint would be entitled to be invested with the property only upon a strict performance of its condition, and upon his failure to perform any of them, nothing further was required to be done for the establishment of a perfect right in plaintiff. Now what the parties provided against by the clause in the policy quoted in the majority opinion was such disposition of the property as would divest the plaintiff of the title and ownership of it, and the uniform holding of the authorities is that the policy is not defeated, under a provision to that effect, by an executory contract for the sale of the property. *Hill v. Cumberland Valley M. P. Co.*, 59 Penn. St. 474; *Insurance Co. v. Updegraff*, 21 Penn. St. 513; *Insurance Co. v. Stewart*, 19 Penn. St. 45; *Trumbull v. Insurance Co.*, 12 Ohio, 305; *Browning v. Insurance Co.*, 71 N. Y. 508; s. c., 35 Am. Rep. 505; *Washington Ins. Co. v. Kelley*, 32 Md. 421; s. c., 3 Am. Rep. 149; *Kempton v. State Ins. Co.*, 62 Iowa, 83; *Wood Ins.*, § 329; *May Ins.*, § 267.

In *Kempton v. State Ins. Co.*, it was held that the policy which contained a provision similar to that in question was not defeated

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by a contract for the sale of the property. The only difference between that case and this lies in the fact that the purchaser in that was not entitled to the possession of the property until certain payments were made, and the vendor was in possession at the time of the loss, while in this the purchaser was in possession when the fire occurred. But this is not material. The ground of the holding in that case is that the insured was not divested of the ownership of the property by the contract, and that is the case here.

In my judgment the holding of the majority is in conflict with that case, as well as with the current of authorities on the subject.

VOORHEES V. CHICAGO, ROCK ISLAND & PACIFIC RY. CO.

(71 Iowa, 735.)

Carrier—contract—station agent—apparent authority.

The plaintiff, applying to the defendant's station agent at O. for cars to ship hogs, was referred by him to the defendant's station agent at L., on another branch of the road, and the latter agent undertook to have the cars at O. the next day. They were however delayed two days. It was shown that the agent at L. had no actual authority to contract for cars at O. *Held*, that he had no apparent authority to do so, and plaintiff could not recover for the delay.

ACTION for damages. The opinion states the case. The plaintiff had judgment below.

T. S. Wright and L. Kinkad, for appellant.

Bousquet & Earle, for appellee.

REED, J. On the 16 of October, 1882, plaintiff went to Olivet, a station on defendant's road, for the purpose of making arrangements for the shipment, on the next day, of five car loads of hogs from that station to Chicago. There was no telegraph office at Olivet, and the station agent informed plaintiff that an order for the necessary cars could not be forwarded by mail in time to receive them for the next day. Plaintiff claims that the agent requested him to go to Leighton, a station a few miles away, and have an order for the cars telegraphed from there, and stated that the agent there

frequently ordered cars for Olivet. Leighton is on the line of road between Keokuk and Des Moines, while Olivet is on what is known as the "Washington & Knoxville Branch." Both lines are operated by defendant, and they cross each other at Knoxville Junction, a few miles from Olivet and Leighton. The Washington & Knoxville branch has a direct Chicago connection, and it was by that line that plaintiff desired to ship his hogs. He went to Leighton and as he claims, informed the agent there that the agent at Olivet requested that an order for the cars be telegraphed from there. The agent accordingly sent a dispatch to the train dispatcher on the Keokuk and Des Moines line, requesting him to send the cars to Olivet in time for the shipment the next day. The name of the Olivet agent was signed to the dispatch, and plaintiff saw it before it was sent. He also testified that the agent afterward told him that he had received an answer to the dispatch, and assured him that the cars would be at Olivet in such time that the shipment could be made on the next day. He claims that relying on this assurance he drove his hogs to Olivet, and was ready to ship at the designated time. The cars were not delivered at Olivet however until the nineteenth, and the hogs were shipped on that day. If they had been shipped on the seventeenth, they would have arrived at Chicago on the nineteenth. As it was they reached there on the twenty-first. A material decline occurred in the price of hogs in the Chicago market between the nineteenth and twenty-first. By this action he seeks to recover the cost of keeping the hogs from the seventeenth to the time they were shipped, and the difference between what he received for them when he sold them and the amount he would have received if he had been able to place them on the market on the nineteenth. The Olivet and Leighton agents were both examined on the trial. The former denied that he requested plaintiff to go to Leighton, and the latter testified that he did not give plaintiff any assurance that the cars would be at Olivet the next day; and it was proven that the agent at Leighton had no express authority to transact business for defendant, except that pertaining to his own station; also that the train-master, to whom such dispatch was sent, had no express authority to send cars to stations on the other line.

I. The District Court gave the following instruction to the jury: "If you find from a preponderance of the evidence that plaintiff applied to the station agent of defendant at Olivet for cars in which

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to ship his hogs to Chicago, such cars to be furnished at a specified time and place, and thereupon such agent informed plaintiff that he could not telegraph from Olivet, and requested him to go to Leighton station, on another branch or division of defendant's railroad, and have the station agent at that station telegraph to the proper authorities for such cars, and you find that plaintiff did request such agent at Leighton to so telegraph, and you find that such agent telegraphed to the train dispatcher of defendant at Keokuk for such cars to be delivered or furnished at Olivet station at a specified time, and thereafter informed plaintiff that he had received a reply to the effect that such cars would be furnished at such specified time and place, and you further find that plaintiff relied in good faith upon such information, and in pursuance thereof drove his hogs to Olivet, and had them there ready for shipment at said time, and defendant failed to have such cars there at such time, and you find that the plaintiff suffered damage in consequence of such failure, then plaintiff would be entitled to recover the damages, if any, resulting therefrom."

If defendant is liable on the hypothesis stated in this instruction, such liability must be upon the ground that its failure to have the cars at Olivet at the time in question was a breach of some contract obligation existing between it and plaintiff. Defendant, being a common carrier, is bound to furnish shippers reasonable facilities for the transportation of their property, and would doubtless be responsible to one who had demanded transportation facilities for any damages he may have sustained in consequence of its failure to afford such facilities within a reasonable time after such demand. Plaintiff however is not seeking to recover on the theory that there was an unreasonable delay after demand in furnishing the cars, but his claim is that defendant was under obligation to furnish them at a particular time, and that he has been damaged by its failure to furnish them at that time. The doctrine of the instruction is that if plaintiff, at the request of the agent at Olivet, went to Leighton, and requested the agent there to telegraph to the proper officer or agent for the cars, and that agent, acting upon that request, sent the dispatch, and afterward stated to plaintiff that he had received an answer to it, and that the cars would be at Olivet on the next day, and plaintiff acted on that assurance, defendant was bound to furnish the cars at the specified time, and was answerable in damages for its failure to do so.

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That defendant is bound by such contracts as are entered into in its name, by its agents, within the actual or apparent scope of their authority, is of course conceded. It was held in *Wood v. Chicago, M. & St. P. Ry. Co.*, 68 Iowa, 491, that a station agent was authorized to contract for the shipment of property from his station, was presumed to be empowered to contract with reference to all the ordinary and necessary details of the business, and that when from the nature of the property to be shipped, or other circumstances, it was necessary or usual to arrange or contract for the shipment of the property in advance of its delivery, the company was bound by his contract to furnish the necessary cars at the specified time, whether he had any express power to make the contract or not. The ground of the holding is, that by placing him in charge of its business at that station, the company held him out as possessing authority to make the contract, and shippers were warranted in dealing with him on the assumption that he had full power in the premises. In the present case however the agent by whom it is alleged the contract was made was not held out by defendant as possessing any power with reference to the subject of the contract. He was not in fact authorized to contract for the shipment of property from Olivet; nor was he held out as possessing such authority. His duties were limited to his own station, and there was nothing in the circumstances which warranted plaintiff in the assumption that he had authority to contract with reference to business at Olivet. The facts of the case do not therefore bring it within the principle announced in *Wood v. Chicago, M. & St. P. Ry. Co.*, *supra*, and the doctrine of the instruction finds no support in that case.

The fact that the agent at Olivet requested plaintiff to go to Leighton, and procure the agent there to send the order for the cars, is not material; for his authority in the premises was neither actually nor apparently enlarged by that request. If the officer or agent to whom the order was transmitted had directed him to make the agreement for the furnishing of the cars on the next day, defendant would probably have been bound by it; but under the instruction plaintiff's right of recovery is not dependent on whether such direction was in fact given, but upon whether the agent represented that it had been given. The declaration of the agent at the time of the transaction is thus made proof of the extent of his powers. The instruction, we think, is clearly erroneous.

Judgment reversed.

CASES
IN THE
SUPREME COURT
OF
WISCONSIN.

CURRAN v. WITTER.

(88 Wis. 16.)

Negotiable instrument — certificate of deposit — statute of limitations.

A banker's certificate of deposit in the ordinary form is a negotiable note, and the statute of limitations attaches to it from its date, without demand.*

ACTION on a certificate of deposit. The opinion states the case. The plaintiff had judgment below.

Gardner & Gaynor, for appellant.

Raymond & Haseltine, for respondent.

LYON, J. In *Klauber v. Biggerstaff*, 47 Wis. 551, the late chief justice, after giving the elementary definition of a promissory note, proceeded to say that "the ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there was ever a doubt that it was in law a negotiable promissory note. *O'Neill v. Bradford*, 1 Pin. 390, and cases there cited. Such doubt however may now be considered at rest. *Kilgore v. Bulkley*, 14 Conn. 362; *Bank of Orleans v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How. 218." After this authoritative statement of the rule, it is useless to cite any more of the numerous cases elsewhere which hold the same doctrine. Several of them

* *Contra: Long v. Strauss* (107 Ind. 94), 57 Am. Rep. 87, and note, 97.

will be found in the brief of counsel for the defendant. The certificate of deposit in suit is in the ordinary form of such instruments, and it is therefore in substance and legal effect a negotiable promissory note.

The next question is, when did the statute of limitations commence to run against the certificate? The plaintiff maintains that it commenced to run only upon demand of payment, which was first made in 1885; while the defendant claims that it commenced to run as soon as the certificate was issued. There are plenty of adjudications by courts of great authority sustaining both of these propositions. The question is now presented to this court for the first time; and we must choose between these conflicting lines of authority, and adopt the rule which seems to us to rest on the soundest principles and which best accords with the analogies of the law.

What would be the equivalent of this certificate were it put in the usual form of a promissory note? Undoubtedly it would be for the same amount, payable on demand to the same payee or order, perhaps at the office of the maker, and probably without interest until actual presentation and demand of payment. It would be substantially in this form: "For value received, on demand, I promise to pay James Curran, or order, at my bank in Grand Rapids, Wisconsin, \$540, without interest until after demand." That such a note is due presently and the statute of limitations commences to run against it from its date, is well settled. What valid reason can be given why the same results should not follow the giving of a certificate of deposit which contains the same contract and is the exact equivalent of such a note? If any such reason exists, we have failed to comprehend it. In *Brummagim v. Tallant*, 29 Cal. 503, it was held that the statute of limitations begins to run against a banker's certificate of deposit payable on demand from the date of the same, and that no special demand is necessary to put the statute in motion. We entirely agree with the Supreme Court of Michigan, which in *Tripp v. Curtenius*, 36 Mich. 496; s. c., 24 Am. Rep. 610, after approving the rule of the California case, proceeds to say of a certificate of deposit in the usual form: "To hold such instruments to be in legal effect promissory notes payable on demand, and yet not apply the principles applicable to demand promissory notes, either because of the peculiar form of the instrument or because issued by a firm engaged in

the ordinary business of banking, would be to create a distinction unsound in principle, and one not warranted by any necessity that we can discover." See also *Cate v. Patterson*, 25 Mich. 191; *Poor-man v. Mills*, 35 Cal. 118.

The cases which hold that such a certificate is not due until presented for payment, and hence that the statute of limitations does not commence to run against it until such presentation, seem to go upon the ground that the transaction is not alone of money, creating a debt against the drawer of the certificate, but rather that it is in the nature of a bailment, upon which no cause of action accrues until demand; in other words, it is said the transaction is in contemplation of law a deposit and not a loan. This doctrine is held or intimated in *Payne v. Gardiner*, 29 N. Y. 146; *Munger v. Albany City Nat. Bank*, 85 N. Y. 589; *Nat. Bank of Fort Edward v. Washington Co. Nat. Bank*, 5 Hun, 605; *Fells Point Sav. Inst. v. Weedon*, 18 Md. 320, and *Bellows Falls Bank v. Rutland Co. Bank*, 40 Vt. 377. With all due deference to the very able courts which have adopted this view, we cannot give our approval to the doctrine thus enunciated by them. We think that when a person deposits money in a bank in the usual course of business he loans it to the bank and the bank thereby becomes his debtor to the amount of his deposit, not his bailee of the money. By the deposit the title to the money passes to the bank, and it is thereafter its money, subject to its absolute control and disposition. The depositor cannot reclaim the specific money. He cannot maintain replevin or trover for it (as he might were the deposit a bailment), but only *assumpsit* for the amount deposited. In short, the transaction has no element of a bailment, but every essential element of a loan of money. That was the view of Judge BRONSON in *Downes v. Phoenix Bank*, 6 Hill, 297, which was an action for the amount of a deposit, the evidence of which was the entry made by the proper officer of the bank in plaintiff's bank book. The judge said, speaking of the transaction: "It is not strictly a deposit nor a bailment of any kind; for the same thing is not to be returned, but another thing of the same kind and of equal value. In the civil law it is called a *mutuum* or loan for consumption. Except where the deposit is special, the property in the money deposited passes to the bank, and the relation of debtor and creditor is created between the parties."

It is unnecessary to prolong this discussion. We must hold, with the Michigan and California courts, that the money claimed

in this action was due and payable at the date of the certificate in suit—October 6, 1869—and hence that the claim was barred by the statute (R. S., § 4222) on and after October 7, 1875. Section 4234 has no application to this action, because James Curran died more than one year before the statute had run against the claim. That section provides that “if a person entitled to bring action die before the expiration of the time limited for the commencement thereof, and the cause of action survive, an action may be commenced by his representatives after the expiration of that time and within one year from his death.” It is obvious that this provision only reaches a case where the person entitled to bring the action dies during the last year of the term of limitation. Neither is section 4251, which doubles the period of limitation in a certain contingency, applicable to this case. That section only applies to cases in which there is no person in existence when the cause of action accrues who can bring the action. We are further of the opinion that this case is not within the provisions of section 4230, Revised Statutes, which is a part of chapter 177. That chapter contains the statute of limitations. The section provides that “none of the provisions of this chapter shall apply to any action brought upon any bills, notes, or other evidences of debt issued by any bank, or issued or put into circulation as money.” The certificate of deposit in suit was not issued by a bank; neither was it put into circulation as money.

The claim having been barred by the statute of limitations long before the action was commenced, instead of directing a verdict for the plaintiff the court should have directed the jury to find for the defendant.

The rejection of the testimony of the witness Moody was also error. On the authority of *Schettler v. Jones*, 20 Wis. 412, his testimony, founded on the entries made by him in the defendant's account-books, should have been received, although he had no independent recollection of the transactions thus entered. In the opinion by Chief Justice DIXON, in *Schettler v. Jones*, the rule in its application is thus stated: “The charges were not mere private memoranda made by the witness for his own convenience, but entries in the books of the plaintiff in the regular course of business. In such cases, we think the sounder and better rule to be that if the witness can swear positively that the memoranda or entries were made according to the truth of the facts, and consequently

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that the facts did exist, that is sufficient, though they may not remain in his memory at the time he gives his testimony. He may testify from the entries, and when he does so he swears positively to the truth of the facts stated in them." This case was followed, and the same rule applied in *Riggs v. Weise*, 24 Wis. 545. Many cases in support of the rule are cited in the opinion in *Schettler v. Jones*, and in the brief of counsel for defendant in the present case.

By the COURT.—The judgment of the Circuit Court is reversed, and the cause will be remanded for a new trial.

Judgment reversed and cause remanded.

KICKLAND V. MENASHA WOODEN WARE CO.

(68 Wis. 34.)

Deed — consideration — agreement to pay more — agency.

An agent authorized to buy land for a consideration paid the sum mentioned in the deed, but orally agreed to pay more in the future. The corporation accepting the deed, *held*, liable for the additional consideration.

ACTION for purchase-money. The opinion states the case. The plaintiff had judgment below.

Raymond & Haseltine, for appellant.

Cate, Jones & Sanborn, for respondent.

ORTON, J. In 1878 one E. D. Smith was director and superintendent, and one Henry Hewitt, Jr., was director of the defendant company. Hewitt, on behalf of the company, negotiated a bargain with the plaintiff for the purchase from him of a strip of land one rod wide, lying along the Wisconsin river, including lakes and bayous leading into the river, for rafting and booming purposes, on lots 1 and 2, in section 15, town 24, range 7 east, for the use of said company, and Smith, on behalf of said company, consummated said bargain by paying the said plaintiff down \$100 and by receiving a deed of conveyance to said company from said plaintiff of said premises. The said \$100 was the nominal consideration in said deed, but it was a part of said bargain, that in addition to said \$100 named in the deed and as part of the consideration of said

purchase, whenever and at such time as the said company shall sell said premises it shall pay to said plaintiff one-half of the excess it shall receive as the consideration of such sale over and above said \$100, after deducting from the excess costs, expenses and improvements, as the whole of said consideration. About the same time the company so purchased of the said plaintiff and so agreed, it purchased of one Jessie Martin and one John Riches a tract of land of about ten acres adjoining the premises so purchased of the plaintiff, by and through the agency of said E. D. Smith, and on behalf of the company, and it was agreed that \$300 should be the nominal consideration of the conveyance thereof, but that whenever the company should sell said land, it should pay to them one-half of the consideration of such sale over and above said \$300, deducting costs, expenses and improvements, which together with the said \$300 paid and named in said conveyance should constitute the full consideration of said purchase, and the company received a deed of said Martin and Riches for that consideration and on such condition, which in effect, was the same agreement as to a future sale of the premises as the one made between the company and the plaintiff.

The said Smith had said deeds duly acknowledged and recorded, and the company entered into possession of the premises. In 1882, the company, without making any improvements upon the premises purchased of the plaintiff, but having made some improvements on the premises purchased of said Martin and Riches, sold the whole of both of said premises to the Webster Manufacturing Company for \$2,000, and the purchase-money was paid into its treasury. This deed was executed by E. D. Smith as the then president, and by H. S. Smith as the secretary of the company. The contingency upon which the balance of the purchase-money has become due and payable having transpired, the plaintiff now demands judgment for one-half of the amount for which said premises so conveyed by him to the company was sold in excess of said \$100, and deducting costs, expenses and improvements, if any, to be ascertained by the proportionate value of the two premises or tracts of land so sold and conveyed to the company, which sum so demanded he alleges to be \$300. These are substantially the facts proved.

In disposing of the questions raised on this appeal, it will be unnecessary to specially refer to the several errors complained of in admitting evidence, in instructing the jury, or in refusals to instruct as asked by the appellant; for the questions arise upon the mere

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statement of the facts and are not difficult of solution. In the order in which these questions are discussed in the brief of the learned counsel of the appellant, they are:

First. That the terms of the deed as to the amount of the consideration cannot be changed by parol. There was formerly some conflict in the authorities upon this question, but since the case of *Hannan v. Oxley*, 23 Wis. 519, it has not been an open question in this State. It was there held "that parol proof may be given to show an additional consideration not inconsistent with the deed." See authorities cited in the opinion. This case has been frequently followed by this court. *Horner v. C. M. & St. P. R. Co.*, 38 Wis. 165; *De Forest v. Holum*, 38 Wis. 516.

Second. That this agreement to pay more than the consideration named in the deed is void by the statute of frauds. It is not perceived how this question can be raised in such a case. The deed is valid as a conveyance of the land, and the respondent does not seek to impeach it or to change it in any manner as a valid conveyance. He only seeks to prove by parol what was the whole consideration of the sale, and that a considerable part thereof has not been paid. A promise to pay money, supported by a sufficient consideration, cannot be held void because it was in *parol*, most certainly; and this was all the respondent sought to show. There is consideration expressed in the deed sufficient to support it and take it out of the statute. The additional consideration of the sale not paid, whether resting in parol or in writing, cannot affect the deed as a valid conveyance under the statute in any respect. It seems to be well settled that it is competent to prove by parol what the real consideration agreed to be paid was, and to show that the same or some part of it remains unpaid, though not thereby to impeach the title conveyed by the deed. 3 Washb. Real Prop. (3d ed.) 327; *Kimball v. Walker*, 30 Ill. 510; *Villers v. Beaumont*, 2 Dyer, 146; Phil. Ev. 482; *Belden v. Seymour*, 8 Conn. 304, cases cited in respondent's brief. But the cases above cited from our own court are sufficient. The learned counsel of the appellant admits, and cites cases to that effect, that parol evidence that the consideration named and receipted in the deed has not been paid may be proper; citing *Shephard v. Little*, 14 Johns. 210. Although in that case it was only sought to prove that the consideration named in the deed had not been paid, yet Judge SPENCER, in his opinion, cites the case of a lease where parol evidence was held admissible to prove an additional rent to be

paid by the tenant beyond that expressed in the lease, and he says, near the close of the opinion, that "although you cannot by parol substantially vary or contradict a written contract, yet these principles are inapplicable to a case where the payment or amount of the consideration becomes a material inquiry." This language is repeated by Judge WOODWORTH in a similar case of *Bowen v. Bell*, 20 Johns. 338. The case of *M'Crea v. Purmort*, 16 Wend. 460, also cited by the learned counsel of the appellant, was one where the clause in the deed, acknowledging the receipt of a certain sum of money as the consideration of the conveyance, was held open to explanation by proof in parol that the consideration was to be paid in bar iron at a stipulated price. In *Wilkinson v. Scott*, 17 Mass. 249, it was held that the receipt or acknowledgment of the payment of the consideration in a deed was only *prima facie* or presumptive evidence of it and was open to explanation by parol; and that it was not a case within the statute of frauds, because it was not a contract for the sale of land; that that contract was executed and finished by the deed; and that it was only a demand for money arising out of the contract. If proving that no part of the consideration had been paid, against the receipt in the deed and acknowledgment by the deed that it had been paid, is proper, as the learned counsel admits, although so far in contradiction of the deed itself, how much more proper to prove an additional consideration not expressed or receipted in the deed. But enough on these first two points. See 2 Phil. Ev. 655, marginal, and cases cited in note 2.

Third. That the said E. D. Smith, who consummated this contract of purchase, had no authority from the corporation to act as its agent in doing so, and especially had no authority to make the agreement to pay the plaintiff such additional consideration for the purchase. It is not strenuously insisted that he did not have authority to purchase the premises for the consideration named in the deed. It could not be reasonably so claimed, for the corporation defendant received all of the fruits of the purchase, and sold and conveyed the premises at a large profit to the Webster Manufacturing Company and received the consideration, and in the most positive manner ratified and assumed the acts of the pretended agent Smith in making such purchase and paying the consideration named in the deed and in the taking of the conveyance to the company. But it is claimed that there being no proof that the company ever had any notice of the promise to pay the additional con-

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sideration, it therefore could not and has not ratified it. The ratification of the acts of the agent in any particular transaction is equivalent to his having prior authority from the principal to do them. *Omnis ratihabitio retrotrahitur et mandato priori aequiparatur*. It follows then that this case must be treated as if E. D. Smith, the director, had original authority from the corporation to make this purchase so far as any act of his is apparent on the face of the deed. But this is not the full extent of the agent's authority. He had authority to make the bargain or the contract of purchase which preceded the deed, and which was executed, at least in part, by the conveyance of the premises. And a part of such bargain was that the company should pay this additional consideration.

Had the company any right to assume, from a mere knowledge of the deed, that its agent had not agreed to pay any additional consideration? If it had, then the consideration named in the deed is conclusive and not merely *prima facie* or presumptively the whole amount. But we have seen that other and additional consideration may rest in a parol promise. Does it not follow, that the company having given the agent authority to make the purchase, such authority extended to the amount of consideration to be paid even beyond that named in the deed?

The legal rule is that the principal is not only liable for the acts of the agent in the main transaction, but for his acts, representations, declarations or admissions within the scope of the authority confided to him respecting the subject-matter, if done or made at the same time and constituting a part of the *res gestæ*. Story Agency, § 134, and authorities in note 1. "An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement, and in many cases by his acts." Story Agency, § 136, and note. Such agreement or acts may be the very inducement of the contract of sale. An example is given by the author of this principle, familiar from its frequent occurrence. Thus, for example, what an agent represented at the time of the sale of a horse, which sale was authorized by his master, whether it be a representation or a warranty of soundness or of any other quality, will be binding upon the master. Story Agency, § 137.

Suppose the master is not informed of any thing but the sale. Is he not bound? *Mundorff v. Wickersham*, 63 Penn. St. 87. In this case the plaintiff had lent the defendant a note at the request

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and by the authority of the defendant's agent, and delivered it to such agent for the defendant, and at the time it was so delivered the agent, without any direct or special authority to do so from the defendant, signed a receipt for his principal, agreeing to protect the note at maturity. The defendant, as principal, was held bound by the agreement, and liable.

But again, "it a general rule that when a ratification is established as to a part, it operates as a confirmation of the whole of that particular transaction of the agent." So a debtor cannot have the benefit of a compromise and release effected by his agent with his creditors, without adopting all the representations made by the agent to the creditors in negotiating the same. *Ferguson v. Carrington*, 9 Barn. & C. 59; *Corning v. Southland*, 3 Hill, 552; and other cases in note 1 to § 250, Story Agency. This principle is irrespective of notice to the principal or want of notice as to some part of the contract. But even in respect to notice, notice of facts to an agent is constructive notice thereof to the principal himself when it arises from or is connected with the subject-matter of his agency; for upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal; and if he has not, still the principal having intrusted the agent with the particular business, the other party has the right to deem his acts and knowledge obligatory upon the principal. Story Agency, § 140, and note 1.

In the application of these principles, what was the subject-matter and the *res gestæ*, and what was the scope of the agency of E. D. Smith in making the purchase and taking the deed of the plaintiff's land and privileges for the use of the company? Was it not the whole agreement and its terms and conditions? It must be conceded that Smith had authority to pay the \$100 and receive the deed. But this was not the whole of the subject-matter of the transaction or of the *res gestæ*, or the scope of the contract. There was a promise to pay more than the \$100 named in the deed, and which may be presumed to have constituted, at least to a great extent, the inducement of the sale. It must be held that the company is bound to pay this additional consideration, because (1) it was a material part of the bargain the agent was authorized to make; (2) the company is bound by the act or promise of the agent within the scope of the main transaction which was authorized or ratified by the company, and such promise was a part of the *res*

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gesta; (3) the ratification of a part is a ratification of the whole of that particular transaction of the agent; (4) notice to or knowledge of facts by the agent is constructive notice thereof to the principal himself when it arises from or is connected with the subject-matter of the agency, and it is presumed that the agent has communicated such facts to the principal, and if he has not, the principal having intrusted his business to the agent, the other party has the right to deem his acts and knowledge obligatory upon the principal; (5) where a corporation has received the benefit of a contract, it must perform its part of it, *De Groff v. Am. L. T. Co.*, 21 N. Y. 127; (6) when a party deals with a corporation in good faith, in respect to matters concerning which it has conferred authority upon the agent, and is unaware of any defect of authority or other irregularity on the part of the agent, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity exist, *Gano v. C. & N. W. R. Co.*, 60 Wis. 12; *Merchants' Bank v. State Bank*, 10 Wall. 604; (7) the company having accepted the benefit of the contract, and retained the property, or sold it and received the purchase-money and retained it as the fruits of the contract, it must carry out all the terms of the contract and pay the full amount of the purchase-money agreed to be paid therefor by its agent. *Scott v. M. U. & W. G. R. Co.*, 86 N. Y. 200; *Le Neve v. Le Neve*, 3 Atk. 665.

The only other question to be considered is whether the method adopted by the Circuit Court, by instruction to the jury, and in the admission of evidence, by apportionment upon the comparative value of both tracts of land included in the deed of the company to the Webster Manufacturing Company, was the proper manner of ascertaining the amount for which the tract sold and conveyed by the plaintiff to the company was sold for. It was the fault of the company that it sold both tracts together and conveyed them by the same deed for a consideration in gross. This has made such an apportionment absolutely necessary. It cannot be ascertained for what the premises sold by the plaintiff were sold for by the company in any other known way. In such a case, apportionment is the proper method. 1 Bouv. Law Diet, tit. Apportionment. It is the only method of determining the amounts which each of several parties interested in an estate shall pay toward the removal of an incumbrance on the whole. 1 Washb. Real Prop. 96, 534. It is

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the only method of ascertaining the damages in case of a breach of the covenant of seisin as to a part only of the premises conveyed. *Hall v. Gale*, 20 Wis. 292; *Noonan v. Hsley*, 21 Wis. 138. There is no more difficulty in apportioning this excess received by the company, between the plaintiff and Martin and Riches, than in any other apportionment. There is no mathematical certainty in any apportionment, for it depends upon comparative values, but it is as near certainty as possible.

This cause was evidently very ably tried, and the rulings of the court seem to have been deliberate and judicious. We do not think there is any error in the record that is material, and the verdict appears to be just and supported by the evidence.

By the COURT.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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(28 Wis. 73.)

Patents—jurisdiction—right of master in invention of employees.

A State court has jurisdiction of an action, between residents of the State, to enforce a contract to assign a patent right for an invention.

A manufacturing company was preparing to put upon the market a new machine. Its superintendent, knowing this intention, voluntarily disclosed to the company a device of his own, and by direction of the company, with its materials and at its expense, voluntarily applied his device to the machines. *Held*, that this did not imply an agreement for the absolute assignment to the company of a patent for the device, but implied a perpetual license to the company to apply the device at those works, and sell the machines anywhere. (See note, p. 847.)

SPECIFIC performance. The head-note sufficiently states the case. The plaintiff had judgment below.

Rufus B. Smith and *S. U. Pinney*, for appellant.

Stevens & Morris, for respondent.

CASSIDAY, J. The power to promote the progress of science and the useful arts, by securing for limited times to inventors the exclusive right to their respective discoveries, is vested in Congress. Sec. 8, art. 1, Const. of U. S. They have enacted, in effect,

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that any person who has invented or discovered any new and useful machine or improvement thereof, not known or used by others before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application unless the same is proved to have been abandoned, may obtain a patent therefor. Sec. 4886, Rev. Stat. of U. S. But notwithstanding the fact that the right of the inventor is thus secured by act of Congress, and the further fact that the Circuit Courts of the United States have original jurisdiction of all suits at law or in equity arising under the patent laws of the United States (subd. 9, § 629, Rev. Stat. of U. S.), yet the jurisdiction of the State court in this case is unchallenged and unchallengeable. The case involves no question as to the identity of the inventor, nor as to the validity or infringement of any patent that has been or may be issued to secure a monopoly of the invention. The action is based upon the breach of an alleged contract between parties, both of whom at the time resided in this State, to assign the right to the patent for the invention. In this case there can be no question but that the State court properly took jurisdiction. *Nesmith v. Calvert*, 1 Wood. & M. 34; *Hartell v. Tilghman*, 99 U. S. 547, and cases there cited. It is like an action for the specific enforcement of a contract for the sale or lease of land the title to which is held by patent from the United States. *Id.*

Before any inventor or discoverer can receive a patent for his invention or discovery, he must make application therefor in writing. Section 4888, Rev. Stat. of U. S. The applicant must make oath that he verily believes himself to be the original and first inventor or discoverer of the machine or improvement for which he solicits a patent. Section 4892. The specification and claim must be signed by the inventor. Section 4888. It stands confessed that the defendant was the inventor of the tilting device in question. Of course, every patent, or any interest therein, is assignable in law by an instrument in writing. Section 4898. But the defendant had obtained no patent at the time this action was commenced. Patents may however be granted and issued to the assignee of the inventor or discoverer, but the assignment must first be entered of record in the patent office, and in all cases of an application by an assignee for the issue of a patent, the application must be made, and the specification sworn to, by the inventor or discoverer. Section 4895.

Under these statutes it is apparent that such assignee can get no patent until he has first obtained an assignment thereof from the inventor or discoverer and complied with the conditions thus prescribed. Of course, neither the inventor nor his assignee has any exclusive right to the invention until a patent therefor has been issued; but the inchoate right to such exclusive use is vested in the inventor as soon as the invention is completed, and he may sell and assign the same, even before a patent therefor has been issued, and then the patent may issue to him or his assignee upon compliance with the statute. *Gayler v. Wilder*, 10 How. 493; *Railroad Co. v. Trimble*, 10 Wall. 379; *Hendrie v. Sayles*, 98 U. S. 546. Such assignment may not only be valid as to an existing invention, but may be broad enough to include a subsequent invention. *Railroad Co. v. Trimble*, *supra*; *Nesmith v. Culvert*, 1 Wood & M. 39-44; *Continental Windmill Co. v. Empire Windmill Co.*, 4 Fish. Pat. Cas. 428; 8 Blatchf. 295; *Wilkins v. Spafford*, 3 Ban. & A. 274; *Hammond v. M. & H. O. Co.*, 92 U. S. 724.

It is here claimed, in effect, that the plaintiff expended several thousand dollars in perfecting the device in question and bringing it into public use, upon the faith of an implied contract with the defendant that he would, upon completion, assign to the plaintiff such invention and his right to letters-patent therefor, but which he refused to do after being duly requested. This suit is brought to enforce the specific performance of such implied contract. It is a general rule that equity will not enforce specific performance when there is an adequate remedy at law. This court has however sanctioned the enforcement of a specific performance of an oral contract to execute a lease, in a case where such adequate remedy was not apparent. *Seaman v. Aschermann*, 51 Wis. 678; 57 Wis. 547.

In *Appleton v. Bacon*, 2 Black, 699, both parties claimed title to the invention as the assignee of the inventor, North. The suit was to restrain Bacon, who had obtained letters-patent for the invention dated August 10, 1858, from manufacturing, using or selling machines embodying the invention, and for the surrender, delivering up and cancellation of the patent, and for general relief. The principal contention was whether the invention was made by North while in the employment of Bacon or his assignor, or subsequently and while he was in the employment of the Appletons. The Supreme Court, reversing the decree of the trial court, found, as a matter of fact, that North made the invention after quitting the

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service of Bacon and while in the service of the Appletons, and accordingly remitted the cause with instructions to enter a decree for the plaintiffs, as the assignees of North, directing the defendant to surrender the patent for cancellation.

In *Binney v. Annan*, 107 Mass. 94; s. c., 9 Am. Rep. 10, a bill to compel the specific performance of a contract to procure a patent and then assign it to the plaintiff, was held good. The same principle has been repeatedly sanctioned. *Continental Windmill Co. v. Empire Windmill Co.*, *supra*; *Wilkins v. Spafford*, 3 Ban. & A. 274; *Andrews v. Fielding*, 20 Fed. Rep. 123; *Hapgood v. Rosenstock*, 23 Fed. Rep. 86.

In this last case a bill for the specific performance of a contract with the inventor was maintained against a subsequent assignee of the patent with notice, and the court observed that "although equity does not, as a general rule, decree specific performance of contracts relating to personal property, yet ordinarily adequate compensation in case of a breach may be obtained by way of damages at law. * * * Agreements for the assignment of a patent, and for delivery of chattels which can be supplied by the vendors alone, and for renewals of leases, are among those which will be specifically enforced." To the same effect is *Slemmer's Appeal*, 58 Penn. St. 155.

Such being the law, and there being no claim in this case, nor any ground for claiming, that there was any express contract on the part of the defendant to assign to the plaintiff the inchoate right to the invention, the question recurs whether upon the facts stated the law implies such a contract.

In the leading case of *McClurg v. Kingsland*, 1 How. 202, one Harley, in October, 1834, while in the employment of the defendants at their foundry in Pittsburgh, and after numerous experiments made therefor, in said foundry, wholly at the expense of the defendant, who increased his wages on account of the useful result, invented the improvement patented March 3, 1835, upon an application made February 17, 1835, and assigned the same to the plaintiffs, March 16, 1835, in pursuance of an agreement made with them in the January before. From the time of completing the invention, in October, 1834, until February, 1835, Harley remained at work in said foundry as such employee of the defendants, engaged in the manufacture of machines for them embodying such invention, without any objection or claiming any compensation for

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such use, and during the time proposed that they should take out a patent therefor and purchase his right, which they declined. In that suit, brought by the plaintiffs, as the assignees of the patent to Harley, against the defendants for the infringement of the same, it was held, in effect, that the facts stated justified the presumption of a license from Harley to the defendants to so use the invention, and that the plaintiffs took their assignment subject to such license. In that case stress was laid upon section 7 of the act of Congress of 1839, analogous to section 4899, R. S. of U. S., which provides that "every person who purchases of the inventor or discoverer, or with his knowledge and consent constructs, any newly invented or discovered machine or other patentable article, prior to the application by the inventor or discoverer for a patent, or who sells or uses one so constructed, shall have the right to use, and vend to others to be used, the specific thing so made or purchased, without liability therefor." It was there said by the court, in effect, that one of the objects of the section was "to protect the person who had used the thing patented, by having purchased, constructed, or made the machine, etc., to which the invention is applied, from any liability to the patentee or his assignee;" and that it "puts the person who has had such prior use on the same footing as if he had a special license from the inventor to use his invention, which if given before the application for a patent would justify the continued use, after it issued, without liability." It was there contended that such protection was "confined to the specific machine," etc.; "but," observed the court, "we think that the law does not admit of such construction, whether we look at its words or its manifest objects, when taken in connection with former laws and the decisions of this court in analogous cases." The court concluded by saying: "We therefore feel bound to take the words, 'newly invented machine, manufacture, or composition of matter,' and 'such invention,' in the act of 1839, to mean the 'invention patented,' and the words 'specific machine' to refer to 'the thing as originally invented,' whereof the right is secured by patent; but not any newly-invented improvement on a thing once patented. The use of the invention before an application for a patent must be the specific improvement then invented and used by the person who had purchased, constructed, or used the machine to which the invention is applied." But while such specific license may be inferred from the mere construction of machines embodying the invention with the

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knowledge and consent of the inventor, prior to his application for a patent, yet this does not exclude the acquisition of a higher and more extended right by contract between the parties. Such presumption of license found in *McClurg v. Kingsland*, *supra*, has frequently been sanctioned in other cases. *Whiting v. Graves*, 3 Ban. & A. 222; *Chabot v. American B. H. & O. Co.*, 6 Fish. Pat. Cas. 71; *Hapgood v. Hewitt*, 119 U. S. 226, affirming a. c., 11 Fed. Rep. 422; 11 Biss. 184.

In the light of these authorities, as well as reason, it is safe to conclude that upon the facts stated the law implied an agreement for a license from the defendant to the plaintiff to manufacture perpetually, at its present works, machines embodying the invention in question, and to sell the same wherever it could find a market. The very object of the plaintiff in employing its workmen, including the defendant, in making drawings, patterns, forms, flasks, files, dies, tools, machinery, etc., and in expending money in experimenting with such machine, and in bringing the same into the market and introducing the same to the trade, was apparently to secure a machine as good as, if not superior to any other, and then to continue the manufacture and sale of the same. All this must necessarily have been in the contemplation of the defendant as well as the plaintiff. Knowing such purpose he voluntarily disclosed his conception of the invention in question. Knowing such purpose, he, under the direction of the plaintiff and with its material and at its expense, voluntarily went to work to perfect and construct such machines and to aid in putting them upon the market. But all these facts point to the manufacture by the plaintiff at its works, and then sales by it. They do not clearly and definitely point to the inhibition of such manufacture and sale by some one else, in some distant State—as Maine, Texas, or Oregon. A patent not only gives a right to manufacture and sell, but secures to the inventor and those having rights under him the exclusive monopoly in the invention. Such monopoly extends to each and every portion of our common country. It excludes all persons from such right, unless they first acquire it from the inventor. While the facts disclosed are sufficient to support such affirmative rights in the plaintiff, they are barren of any thing to negative all the rights of the defendant as the inventor. Stress is laid upon the fact that the defendant assigned to Fuller & Johnson an earlier patent. It may be that he did so without knowing his legal rights.

It may be that he did not comprehend his legal right to the invention in question until about the time of his quitting the plaintiff's employment. Still, the question presented is whether the facts disclosed raise an implied agreement to assign the patent to the plaintiff absolutely. This is not to be inferred from the mere passivity of the defendant. In the case of *Whiting v. Graves*, *supra*, patents for a number of inventions, made by the employee under circumstances similar to those here disclosed, were issued to his employer, to whom the right in the inventions had been assigned by the employee at or before the times of making the applications. Subsequently the employee, during such employment, made another invention, which before application for a patent he assigned to his employer upon a verbal agreement that the latter should pay the expenses of the patent for one-half interest in it, which he did, and obtained a patent in his own name, and then filed a bill in equity against the defendant, to whom the employee had assigned his equitable interest in the patent, for infringement; but it was held that the defendant had an equitable right to one-half of the patent, which constituted a good defense. The mere fact, that in making the invention an employee uses the materials of his employer, and is aided by the services and suggestions of his co-employees and his employer in perfecting and bringing the same into successful use, is insufficient to preclude him from all right thereto as an inventor. The same is true of an invention conceived wholly by an employer, and then perfected under his supervision by aid of the mechanical skill and suggestions of his employees. These propositions are sanctioned by numerous adjudications. *Agawam Co. v. Jordon*, 7 Wall. 602, 603; *Collar Co. v. Van Dusen*, 23 Wall. 563, 564; *Blandy v. Griffith*, 3 Fish. Pat. Cas. 615, 616; *King v. Gedney*, 1 MacArthur, 444.

The difficulty with the contrary assumption arises from confounding the machine with the invention it embodies. Of course there must be a machine which will operate before it can be patented. That implies material, workmanship and skill combined. But such combination of itself is not enough to secure a patent. It must also embody an original conception of a new and useful method of doing a specific thing. It is this conception so embodied, evolved from the inventive faculties of the defendant, which constituted the invention in question. The law gave to him the exclusive property in it. He still retains it, except in so far as

he has parted or agreed to part with it. The material, workmanship and skill which embodied that conception remained the property of the plaintiff. But workmanship and skill are both the result of instruction, experience and knowledge. They are acquired by being learned. They may aid and stimulate invention, but are no part of it. An invention, to be patentable, must not only originate with the inventor, but must be new and useful.

The question remains whether the plaintiff, as such licensee, is entitled to any relief in this action. In the very recent case of *Hapgood v. Hewitt, supra*, the bill of complaint was substantially like the one at bar, except as hereinafter mentioned, and sought to compel an assignment of a patent by the employee to the successors of the employer. A demurrer thereto for want of equity was sustained, and thereupon a decree was entered dismissing the bill, and the same has just been affirmed by the unanimous opinion of the Supreme Court of the United States. It was there held that Hewitt, as such employee, took the legal title to the patent in his own right and not as trustee for his employer, and that the latter at most had a mere license to manufacture; that as such license would be a perfect defense to an action at law for the infringement of the patent, relief in equity was properly denied and the bill properly dismissed. To the same effect is the case of *Joliet Manuf. Co. v. Dice*, 105 Ill. 649. The case of *Hapgood v. Hewitt* is however distinguishable from the one at bar in the following particulars: At the time of making the invention, Hewitt was in the employment of "Hapgood & Co.," then a Missouri corporation. After the dissolution of that corporation the suit was commenced by the trustees of that dissolved Missouri corporation, and the "Hapgood Plow Company," an Illinois corporation, as its successor, against Hewitt, and it was held that such a license was not assignable, and that as the employer corporation had dissolved and its stockholders had formed a new corporation under the laws of a different State, the new corporation acquired no right under the alleged assignment to it. Such being the character of the complainants and the holding of the court, the question was not involved as to whether the employer of the inventor, as such licensee, might have maintained an action to enforce the specific performance of such agreement to license.

In *Wilkena v. Spafford*, 3 Ban. & A. 274, the employer contracted for the exclusive benefit of the employee's inventive faculties and

inventions during his term of service, and an exclusive license for the use of the machines during the existence of the patents and any extensions, renewals or reissues of the same, was decreed. In *Hapgood v. Rosenstock, supra*, the court, in speaking of the general rule of refusing equitable relief when there was an adequate remedy at law, observed: "It is apparent that such consideration cannot apply to an agreement like the present, because from the nature of the subject-matter, it would be impossible in many cases to ascertain the damages which licensees might sustain by reason of being deprived of their rights to use an invention;" and accordingly a purchaser of the patent was restrained from violating the terms of the agreement for the license. In *Slemmer's Appeal*, 58 Penn. St. 155, the action was brought by three of the partners against the other, who was the inventor, to compel an assignment of the patent obtained by the latter for his invention used by the firm, and made by him as a member of the firm and while engaged in the business of the firm. The trial court held that the patent belonged to the firm, and decreed accordingly. Although such decree was reversed, on the ground that the defendant, as the inventor, was the lawful owner of the patent in his own right, and the firm only entitled to a license to use the invention, yet it was held that the plaintiffs were jointly and severally entitled to such license, and the same was decreed accordingly. Such ruling seems to have been eminently just. There can be no other adequate remedy in a case like this.

The complaint is criticised mainly on the ground that it states the evidence instead of alleging the facts. Such objection is not available on demurrer *ore tenus*, especially where, as here, the substance of the evidence is stated in the complaint, and then more fully proved upon the trial.

By the COURT.—The judgment of the Circuit Court is reversed, and the cause is remanded with directions to render judgment in favor of the plaintiff and against the defendant to the effect that the latter execute and deliver to the former a license to manufacture machines embodying the invention in question at its present works, perpetually, and to sell the same anywhere in the market, free and clear from any and all liability for any fee, royalty or otherwise, for or on account of any patent which has been or may hereafter be granted for said invention; and in case of failure to so execute such license within a time to be named, then that such

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judgment stand as and for such license and to have that effect; and for any other and further proceedings deemed necessary to make such judgment effectual.

COLE, C. J., took no part.

NOTE BY THE REPORTER.—The following is an abstract of *Hapgood v. Hewitt*, cited above:

An employee under a contract to devise and make improvements in and get up and perfect plows for his employer, a manufacturer of plows, engaged in that work, and at his employer's expense, and with his material, and the aid of his workmen, devised a plow which his employer thereupon manufactured. Subsequently the employment ceased, and the employee took out a patent for his invention. *Held*, that the employee was not a trustee of the title of the patent for his employer, who had, at most, a mere license to manufacture. The Circuit Court cases referred to do not support the plaintiffs' suit. In *Continental Wind-mill Co. v. Empire Wind-mill Co.*, 8 Blatchf. 295, there was an agreement that the employee should receive \$500 for any patentable improvement he might make. In *Whiting v. Graves*, 2 Ban. & A. 232, it was held that an employment to invent machinery for use in a particular factory would operate as a license to the employer to use the machinery invented, but would not confer on the employer any legal title to the invention; or to a patent for it. In *Wilkens v. Spafford*, 8 Ban. & A. 274, the contract was that the employer should have the exclusive benefit of the inventive faculties of the employee, and of such invention as he should make during the term of service. Whatever license resulted to the Missouri corporation from the facts of the case, to use the invention, was one confined to that corporation, and not assignable by it. *Troy Iron & Nail Factory v. Corning*, 14 How. 193, 216; *Oliver v. Rumford Chemical Works*, 109 U. S. 75, 82. The Missouri corporation was dissolved. Its stockholders organized a new corporation under the laws of Illinois, which may naturally have succeeded to the business of the prior corporation; but the express averment of the bill is that it took, by assignment, the rights it claims in this suit. Those rights, so far as any title to the invention or patent is concerned, never existed in the assignor. As to any implied license to the assignor, it could not pass to the assignees.

STATE V. CARPENTER.

(88 Wis. 165.)

Water and water-course — navigable river — obstruction added to obstructed stream.

When a stream has long been rendered unnavigable by dams and bridges, the erection of a building in it at that point, which of itself would not materially obstruct navigation, may not be restrained at the suit of the public.

BILL for injunction. The opinion states the case. The injunction was denied below.

A. A. Jackson, William Ruger, Fethers, Jeffris & Smith, and the attorney-general, for appellant.

Edward M. Hyzer, for respondent.

ORTON, J. This is a bill or information of the attorney-general against the defendant praying for an injunction to restrain him from driving piles within the channel and low-water mark of Rock river, within the city of Jamesville, as a foundation for the construction thereon of a large building forty by one hundred feet, which he threatens, and which when so constructed, and the interruption of said river for the purpose of navigation caused thereby, "will cause great public inconvenience, mischief and damage," and "interrupt and prevent the free use and enjoyment of the waters of said river for the purpose of navigation, and will cause great, irreparable and permanent injury in that regard." It is alleged that "said river is navigable in fact for steamboats, barges, timber, lumber, rafts and other water-craft, and for the purpose of floating productions and manufactured articles to market, and for the people of the county to travel upon for profit or pleasure, and is so navigable in said county and city at the particular place" where the defendant threatens to erect said building therein, and that the defendant has no lawful authority to erect said building in such place. A preliminary injunction was granted by a court commissioner on said complaint and affidavits in support thereof, which on answer and affidavits in support thereof was dissolved by the Circuit Court, and from the order dissolving the same this appeal is taken.

It appears that the building so threatened to be constructed will occupy that portion of a lot in the city of Jamesville, within said river, belonging to said defendant by conveyance of the owner of the lot, and situated between two bridges over said river, built upon piles, and without draw or swing and within forty rods of each other, and in the vicinity of a building in the center of said river; that dams and bridges span said river within said city in many places, which prevent the use of said river for navigation, and many buildings have been built out into said river from adjacent lots, by the owners thereof, and that such obstructions have existed for a great many years, and that practically and in fact said river has not been and could not be used for navigation, and that there has been no necessity or need for such a use of said river during a very long time past, and that the construction of said building would not materially obstruct or abridge such use if required, because a sufficient channel and space of said river would thereafter remain for such purpose. It does not appear that the public or any one needs or requires, or that any exigency demands the use of said river within said city for the legitimate purposes of navigation at this time.

These facts, which sufficiently appear in the record, would seem to negative the allegations of the complaint that said building would "cause great public inconvenience, mischief and damage," and "great, irreparable and permanent injury," by the interruption of the navigation of said river. Outside the record, we may take judicial knowledge that said river, for a great many years, within cities and villages and in other places, has been obstructed by mill-dams, bridges and buildings, in a similar manner, through this State and the State of Illinois, and that said river has not been practically and in fact navigable or used, needed or required for navigation in the way of transportation or travel. This being the condition of Rock river within the city of Janesville and elsewhere, was it an abuse of discretion for the Circuit Court to dissolve the injunction? Perhaps the question should be broader than this, in order to settle, for the time and under the present conditions, the question whether an injunction at the suit of the attorney-general ought to have been granted or continued in such a case.

The legal proposition made and urged with great learning and ability by the learned counsel of the appellant, in respect to the navigability of Rock river, as far as the ordinance of 1787, the Con-

stitution, and many laws of the State can make it so, is incontrovertible, and this court is bound to take judicial knowledge that it is a navigable stream and public river of this State; and that it is unlawful to obstruct it there can be no question. The public and all persons have the right to its free and unobstructed use for the purposes of navigation at all times and under all circumstances. There was a time, in the early settlement of the country bordering on this river, when it was practically and in fact navigable, and actually used to a limited extent for the floating of logs, and perhaps for small boats and barges. But since that region has been denuded of its forests, and other and better means for transportation have come into use, such practical use of the river has been entirely abandoned, and its waters have been exclusively used by riparian proprietors and for hydraulic purposes, and it has been spanned by highway and railway bridges and mill-dams in near proximity with each other throughout its entire course. We shall see that these considerations and conditions cannot be ignored in a case like the present one, where a court of equity is asked by the attorney-general, on behalf of the public, for an injunction to restrain a single encroachment upon the waters of this river, which at most will not much increase the obstructions which have for a long time existed to its technical and legal navigability.

In this State, at least, there is no such thing as purpresture, even in connection with its navigable waters, where the owner's title to the adjacent banks extends to the center of the stream as he is in most respects a riparian proprietor. Such an owner may use his marginal land in his own way, so that he does not obstruct, impede, or abridge the navigability of the river. His right is only subordinate to such public use. This has been so often decided by this court that the cases need not be cited. Such is not the common law, or the law of many of the States. Purpresture is based upon the title of the sovereign or of the State to the land or soil between high and low-water mark of navigable waters, and was good cause for an injunction even when the encroachment was not a nuisance *per se* or by reason of obstructing navigation. 2 Story Eq. Jur., § 922; *Blundell v. Catterall*, 5 Barn. & Ald. 268; *Attorney-General v. Johnson*, 2 Wils. Ch. 101; *People v. St. Louis*, 5 Gilm. 367; *Houck Rivers*, §§ 300-310; *Ang. Water-courses*, § 546. If the act was a purpresture, it was liable to be abated or restrained in equity as an invasion of the property of the crown or of the State. 1 High Inj.,

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§ 760. In this case then an injunction could not have been granted on that ground, for the defendant had the right to use the shore as a riparian proprietor, if he did not thereby obstruct, impede or abridge the navigability of the river. It was only on the ground that it threatened to be a public nuisance for that reason that it could be enjoined.

It seems that there have always been great doubts as to the interference by a court of equity to grant an injunction against a threatened public nuisance. Ang. Water-courses, § 566; *Attorney-General v. Railroad & Transp. Co.*, 3 N. J. Eq. 136. It is in cases of public nuisances requiring immediate suppression that the Chancery Courts of the United States have jurisdiction. *Georgetown v. Canal Co.*, 12 Pet. 91; *Rowe v. Granite Bridge Corp.*, 21 Pick. 344. In other cases courts of law should be appealed to when the facts can be passed upon by a jury. The jurisdiction of a court of equity to restrain public nuisances at the suit of the attorney-general is one of great delicacy and should not be exercised except to arrest irreparable injury. Ang. Highw., § 280. When the public owns not only the easement but the soil of rivers, and the nuisance is also a purpresture, this equitable relief will meet with greater favor. Ang. Highw., § 282. But even then the threatened nuisance should be such as may injuriously affect or endanger the public interest. *Attorney-General v. Cohoes Co.*, 6 Paige, 133. "To warrant an injunction against a public nuisance, it must clearly appear that it is such in fact; and if be doubtful the relief will not be granted, and the question as to the existence of the nuisance should be determined by a jury before it is granted. *Attorney-General v. Cleaver*, 18 Ves. 217. A nuisance has been defined by this court to be "something which works hurt, inconvenience or damage." *Douglass v. State*, 4 Wis. 387. "Any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance." Ang. Highw., § 223. "Where the injury complained of is not *per se* a nuisance, but may or not become so according to circumstances, and when it is uncertain, indefinite or contingent, or productive of only possible injury, equity will not interfere." 1 High Inj., § 742, and cases cited in note 4.

The nuisance does not consist in obstructing the river, but in obstructing the use of the river as a navigable stream by the public. The defendant may have no right whatever to erect a building in

it that may obstruct the navigation of Rock river, and by doing so he may be technically guilty of a public wrong. But that is not the question. Where is the immediate hurt, injury, inconvenience or peril of the public in this threatened construction, that a court of equity should be called upon to exercise this extraordinary and questionable jurisdiction to enjoin it? If completed as threatened, the public may not for many years, and probably never, suffer any injury or inconvenience from it. The river has not been navigable in fact, or navigated or used or needed for such purpose, for many years, and probably never will be again. The wrong and injury to the public, if any, are merely technical and nominal. Courts of Chancery should not be called upon to exercise this high jurisdiction in a case where it is needless and useless and a mere idle ceremony. *Cui bono?* In order to have the character of navigability, this river should be navigable in fact, or navigable to some purpose useful for trade or agriculture, and must be generally or commonly useful for such purpose, if courts are called upon to interfere to protect its navigability. Ang. Water-courses, § 544, and cases cited in note 2.

In *Attorney-General v. Railroad & Trans. Co.*, *supra*, an injunction was denied, although the information charged "that great mischief and irreparable injury would ensue to the public by the erection of the bridge." Very similar allegations are made in this information, which however were negatived by the facts.

In 1 High Inj., § 770, it is said in the text: "The only ground upon which the obstruction of a navigable creek can be enjoined is the hindrance to navigation; and where the stream is not in fact navigated and has not been for many years, the injunction will be denied."

The case cited to this text is *Gilbert v. Morris Canal & Banking Co.*, 8 N. J. Eq. 495. This case is very much in point. Mill creek is a tide river and empties into the bay of New York, and in its natural state was navigable for lighters and vessels of fifty tons burden quite a distance up into New Jersey, and had public wharves or landings thereon. But for many years it had not been used for navigation, and bridges without draws had been built across it, and railroad embankments had filled it up in some places. The defendant threatened to make a canal across it, and the plaintiffs prayed for an injunction, on the ground that said canal would be a public nuisance by obstructing a navigable stream where the tide

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ebbed and flowed. The language of the opinion of the chancellor is so appropriate that I may be allowed to make a copious quotation of it: "The creek is large enough in width and depth of water, for useful purposes of navigation, if any such navigation were wanted, or would, with the present means of communication with New York, be ever used * * * I cannot say that the shutting up of the creek would be a public nuisance, as obstructing public navigation; and this is the only ground on which this court could interpose. An individual may come into this court, if he is about to be injured by the creation of a public nuisance for an injunction; but in this case it is evident that the public do not and would not use this creek for the purposes of navigation. There is a bridge over this creek without a draw, and has been for eleven years, and the public have taken no step to open it for navigation." This is the only case of similar facts I have been able to find, and probably is the only one that has come before the courts.

It is not probable that any one, much less the attorney-general, would concern himself about a stream which has been so long abandoned for all purposes of navigation, and completely obstructed in so many places, and not needed or used for such purposes, and neither the public nor individuals have suffered any injury or inconvenience thereby. When any one in good faith shall have the means of using this river for the legitimate purposes of navigation, and shall desire to use the same for such purposes, it will be time enough for him or the attorney-general to complain; and the courts of law will afford, in such an exigency, an ample remedy. In the above case the stream was a tide river, and there was no more question of its being a navigable stream in the eye of the law than in the case of Rock river, and it had not been closed up by obstructions, and not used or needed for purposes of navigation, more than half the length of time. This therefore is much the stronger case for a denial of equitable relief.

We do not think that the Circuit Court abused its discretion in dissolving the injunction, and are inclined to hold that the information and the facts do not make a proper case for an injunction at the suit of the attorney-general.

By the COURT.— The order of the Circuit Court is affirmed.

Judgment affirmed.

KLIX V. NIEMAN.

(88 Wis. 271.)

Negligence—pond on private premises—infant trespasser.

The owner of a city lot is not liable for the death of a child who falls into an unfenced pond on his lot, it not being so near the street as to be dangerous to passers.*

ACTION for death of intestate by negligence. The opinion states the case. The defendant had judgment below on demurrer.

J. Coleman, for appellant.

Johnson, Rietbrock & Halsey, for respondent.

COLE, C. J. We think the demurrer in this case was properly sustained, for the reason that the complaint shows no actionable negligence on the part of the defendant. The complaint states that the defendant was the owner of and in the possession of a lot in the city of Milwaukee, situated on the north-east corner of Hubbard and Lloyd streets; that the lot was in a thickly settled and populous part of the city, and was not inclosed by fence either in front thereof between it and Hubbard street, or on the side between it and Lloyd street, but that the lot was vacant and open, so that the public had free and unobstructed access thereto from both Hubbard and Lloyd streets; that for a long time prior to the 5th of September, 1885, there had been upon the lot a deep and dangerous hole or excavation, partially filled with water, making a pond which covered about the entire surface; that the water of the pond was roily, so that its depth could not be ascertained except by measurement, but that in places it was of the depth of nine feet, so that the pond was dangerous to the lives of children who might be attracted thereto for amusement or otherwise; that the defendant, well knowing that the pond was dangerous to the lives of children residing in the vicinity of the same, wrongfully, negligently and carelessly permitted it to remain unguarded by fence or barricade, and the plaintiff's son, a lad about nine years of age, "while play-

* See *Schmidt v. Kansas City Dist. Co.* (90 Mo. 284); 59 Am. Rep. 16, and note, 23.

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ing upon and about said pond of water, being induced thereto by reason of the unguarded and unprotected condition of said hole as aforesaid, fell and was precipitated into the same and was drowned."

It will be observed that it is not alleged that the pond was so near the highway as to make it unsafe for passengers going along the street or sidewalk; and no averment that the boy when he fell into the pond was passing along the street or sidewalk. On the contrary, it is stated that the boy was playing upon and around the pond when he was precipitated into the water and drowned. So the single question presented is: Was it the duty of the defendant to fence or guard this hole or excavation on his lot (which it does not appear he made or caused to be made) where surface water collected, in order to secure the safety of strangers, young or old, who might go upon or about the pond for play or curiosity?

If the defendant was bound to so fence or guard the pond, upon what principle or ground does this obligation rest? There can be no liability unless it was his duty to fence the pond. It surely is not the duty of an owner to guard or fence every dangerous hole or pond or stream of water on his premises, for the protection of persons going upon his land who had no right to go there. No such rule of law is laid down in the books, and it would be most unreasonable to so hold. A learned author states the doctrine in these words: "An owner of land is under no obligation to fence an excavation on his land, unless it is so near the highway as to amount to a public nuisance; and if persons or animals are killed or injured in consequence of his failing to do so, no damages can be recovered. A qualification of this rule is that when the owner of land, expressly or by implication, invites a person to come upon it he will be liable for damages if he permit any thing in the nature of a snare to exist thereon which results in injury to such person, the latter being at the time in the exercise of ordinary care. If however he gives a bare license or permission to cross his premises, the licensee takes the risk of accidents in using the premises in the condition in which they are." 1 Thomp. Neg. 361. Among other authorities cited by the author to sustain this doctrine of the text is *Hardcastle v. South Yorkshire R. Co.*, 4 Hurl. & N. 67, where POLLOCK, C. B., uses this language: "When an excavation is made adjoining to a public way, so that a person walking upon it might, by making a false step or being affected with sudden giddiness, or

in the case of a horse or carriage way, might, by a sudden starting of the horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences; but when the excavation is made at some distance from the way, and the person falling into it would be a trespasser upon the defendant's land before he reached it, the case seems to us to be different. We do not see where the liability is to stop. A man getting off a road in a dark night, and losing his way, may wander to any extent, and if the question be for the jury no one could tell whether he was liable for the consequences of his act upon his own land or not. We think that the proper and true test of legal liability is whether the excavation be substantially adjoining the way, and it would be very dangerous if it were otherwise, if in every case it was to be left as a fact to the jury whether the excavation was sufficiently near to the highway to be dangerous." See *Hounsell v. Smyth*, 7 C. B. (N. S.) 731.

This question is very fully discussed in *Hargreaves v. Deacon*, 25 Mich. 1, and *Gramlich v. Wurst*, 86 Penn. St. 74; s. c., 27 Am. Rep. 684. In *Hargreaves v. Deacon*, the plaintiff, as administrator, sought to recover damages for the death of a son, a child of tender years, who was killed by falling into a cistern which had been left uncovered on premises not immediately adjoining the highway. After a learned and able examination of many cases, Mr. Justice CAMPBELL finds no support to any doctrine which would authorize a recovery. The cistern, he says, "was made, as is customary, with its top substantially on a level with the earth around it, and as is usual where reservoirs, vaults, sewer openings, and the like are made where there is much occasion for passage, and where an elevation might be inconvenient. Such openings require for safety a cover which will bear such pressure as is likely to be brought upon it and keep passengers from falling in. If in a highway or sidewalk, the duty of protection extends to all persons who have a legal right to go there, or in other words, to the whole public, and it depends on that right. If on private property, not open of right to the public, it applies less generally, and only to those who have a legal right to be there and to claim the care of the occupant for their security, while on the premises, against negligence, or to those who are directly injured by some positive act involving more than passive negligence. Cases are quite numerous in which the same questions have arisen which arise in this case, and we have

found none which hold that an accident from negligence, on private premises, can be made the ground of damages, unless the party injured has been induced to come by personal invitation, or by employment which brings him there, or by resorting there as to a place of business or of general resort held out as open to customers or others whose lawful occasions may lead them to visit there. We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience in no way connected with business or other relations with the occupant."

There is a class of cases which hold the proprietor liable for injuries resulting to children from dangerous machinery left unguarded and so exposed as to be calculated to attract their interference with it. *Railroad Co. v. Stout*, 17 Wall. 657; *Keffe v. M & St. P. R. Co.*, 21 Minn. 207; s. c., 18 Am. Rep. 393, and *Koons v. St. L. & I. M. Ry.*, 65 Mo. 592, are of that character. In *Hydraulic Works Co. v. Orr*, 83 Penn. St. 332, the platform which caused the injury was upon a private passage or cart-way adjoining a factory, and in *Birge v. Gardiner*, 19 Conn. 507, the gate was on or near the line of the lane or public pass-way. In this case the plaintiff recovered, but a new trial was ordered on the ground of misdirection of the court, there being evidence of contributory negligence. In *Kerr v. Forgue*, 54 Ill. 482; s. c., 5 Am. Rep. 146, the counters and barrels were placed on the sidewalk on a public street in a "tottering condition," and occupied a considerable portion of the walk. The court held that the negligence of the defendant in placing obstructions upon the sidewalk, and permitting them to remain there for some weeks, "was much greater than the carelessness of the boy," and affirmed the judgment which awarded damages for the injury.

The rule that holds persons responsible for injuries caused by spring-guns, man-traps, etc., is familiar and well settled; but it has no application here. Unless we hold that the defendant was under a legal obligation to fence this pond for the protection of children reaching and playing upon it, there can be no recovery. And it is obvious that a fence would have to be very high and very tight to afford any effectual guard against children having access to the pond. But upon the facts, we do not think the law imposed the duty upon the defendant of building a fence or guard to pre-

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vent children from reaching the pond; therefore he is not liable for the death of the child.

By the COURT. — The order of the Circuit Court sustaining the demurrer is affirmed. *Order affirmed.*

POPOSKEY V. MUNKWITZ.

(88 Wis. 322.)

Damages — measure — landlord and tenant — breach of covenant for quiet enjoyment.

SUFFICIENTLY reported, 58 Am. Rep. 608.

TREAT V. HILES.

(88 Wis. 344.)

Statute of frauds — partnership in profits of lands.

An agreement that one shall procure the conveyance of land to another, who shall pay for it, and that both shall open and work a quarry thereon and share the profits, is not within the statute of frauds.*

ACTION for breach of contract. The opinion states the case. The defendant had judgment below on demurrer.

N. S. Murphy, for appellant.

John W. Cary, for respondent.

ORTON, J. The complaint states substantially the following facts: The plaintiffs, by their superior scientific knowledge, diligence, observation and skill, had discovered a very valuable stone quarry on certain lands of William and Lyman Saunders, in Waukesha county, Wisconsin, of which said owners were ignorant, and wishing to engage some person of abundant means with them in the scheme of making said quarry available to themselves, as well as to such person, by large profits on the investment, they communicated their information of said quarry to the defendant, he being

* See *Kilbourn v. Latta*, ante, 873.

such person of large means and well suited to such an enterprise; and they entered into a verbal contract with him that they should negotiate the purchase of said land for not exceeding \$12,000, to be paid by the defendant, and procure a deed of said land to him, and thereafter they, together with the defendant, should forthwith proceed to open and work the said stone quarry, by quarrying, removing and selling the said stone, for profit, the defendant to advance the necessary money to carry on said business, and the plaintiffs to give and bestow their exclusive time, labor and services for that purpose, and that the net profits of so opening, working and developing said stone quarry, and so selling the said stone, should be equally divided between them, that is, one-half to go to the plaintiffs and one-half to the defendant. The plaintiffs, in pursuance of said verbal contract, on the 28th day of September, 1885, by the employment of much of their time, labor and money negotiated said purchase for said sum of \$12,000, and procured a deed of said lands to be executed and delivered to the defendant, and on the first day of October thereafter they, together with the defendant, employed a foreman for said works, and the plaintiffs purchased tools therefor with the moneys advanced by the defendant for that purpose, and they were shipped to said quarry, and preparations were made to commence said works, and the plaintiffs were ready to perform said contract and commence and prosecute said business on the terms aforesaid with the defendant. The defendant however very soon thereafter refused to allow the plaintiffs to bestow any labor, services or attention to the opening, developing or working said stone quarry, or to divide any profits therefrom, and utterly refused to commence said works with plaintiffs in pursuance of said contract, although they were willing and ready to do as they had so agreed to do on their part, and the defendant notified said plaintiffs that they could have no further interest in said works or business or the profits thereof. The defendant thereupon took exclusive possession of said quarry, and commenced opening, working and developing the same, and selling stone therefrom, to the exclusion of the plaintiffs from said works and the profits thereof. There are proper allegations of a valuable consideration to said contract, and a breach thereof by the defendant. The stone quarry was supposed to be very extensive and valuable, and stone of the quality found therein was worth in market \$4 per cord, deducting all costs and expenses, which would have yielded to the

plaintiffs a very large sum as their share of the net profits of said works had the defendant allowed them to perform said contract, and performed the same on his part. The prayer is for damages for the breach of said contract by the defendant by his refusal to allow the plaintiffs to enter upon and carry out said joint enterprise with him, commensurate with their share of said profits.

A general demurrer to said complaint was sustained by the Circuit Court, and from the order sustaining the same this appeal is taken.

The above is believed to be a substantially correct statement of the facts alleged in the complaint, although much briefer than the complaint itself.

[Omitting a minor consideration.]

The important questions in this case, and which were very ably discussed by the learned and distinguished counsel on both sides, are whether this contract is for any interest in lands, in violation of the statute of frauds in R. S., § 2202, or by its terms is not to be performed within one year, in violation of R. S., § 2307. These questions will be disposed of in their order.

The first question, as to whether this contract is for any interest in the land so purchased by the defendant, upon which the stone quarry is situated, is not very clear or readily answered without a very full examination of the authorities and a critical understanding of the terms, purposes and relation of the contract to the said lands. I confess that it appeared to me at first blush that the contract does create an interest in said land, or convey some interest therein to all of the parties, or to the plaintiffs, or to the copartnership; but upon further and much thought and a full investigation of the subject in the light of the authorities, it appears perfectly clear that it does not, and that the contract is not within the statute. Neither the contract nor the partnership concerns any thing except the mere working of a stone quarry on the land of one of the partners, and the selling of the stone and the profits of the business. It does not convey the stone in the quarry, or any part of it. The quarry remains the property of the defendant, or the owner of the land, all of the time, and the stone severed from the freehold by the joint labor of the parties only becomes the property of the partnership, to be sold for a profit to be equally divided. The contract contains a license to the plaintiffs to go upon the land of the defendant and work the quarry, either as a mere verbal license

which, while it exists, will justify the entry for such purpose, or a right to so work by the authority and in the right of the defendant as one of the copartners. In either case there is no interest in the land itself involved. It may be that such license could be revoked by the defendant at any time but such revocation would involve a breach of the partnership contract, for which damages could be recovered as in this case.

The same principles exist in all mining contracts when the mere working of a mine is the subject of the contract, and no interest in the mine itself is at all affected. This interest, as we shall see, is represented by the shares of stock of a company that has the mere right to work a mine. Such shares represent no interest in the mine itself or the land, but the mere interest in the net profits. The shareholder is entitled to his dividend, which consists of his share of the net profits of the enterprise.

With these preliminary observations, we will notice some of the authorities sustaining these views. In *Gillett v. Treganza*, 6 Wis. 343, the contract conveyed the right to dig on a certain range for lead ore, or as the present chief justice said in his opinion, "to work or search for" lead ore on the land of one of the parties. The language in this contract is "to open, develop, and work the said stone quarry," and again, "by quarrying, removing and selling the said stone." There is absolutely no difference. It is said in the opinion: "Instead therefore of parting with, granting and conveying all the mines and lead ore that were then existing within the land, the words of the agreement import nothing more than a right or license or privilege to search and get these minerals." And again: "But the plain object and intent of this agreement appears to be, not to create a property or estate in the land, not to sell the mines or mineral unsevered therein, but to sell a right, liberty, license and privilege to work, mine and search for lead ore upon the range therein described." It is intimated in the opinion that such a license was probably irrevocable if the mining was prosecuted with diligence. This case would seem to be sufficient authority. But lest its perfect applicability may be questioned, we will look further into the authorities.

The mere right to work a quarry or a mine is not exclusive of the grantor, and conveys no interest in the quarry or mine or the land. Coll. Mines, §§ 1, 5, 9; Co. Litt. 42a; 2 Bl. Com. 121; *Brewer v. Hill*, 2 Anstr. 413; *Hewlins v. Shippam*, 5 Barn. & C.

229. A verbal agreement to share profit and loss in the working of a colliery is not within the statute. *Forster v. Hale*, 5 Ves., Jr., 314; *Watson v. Spratley*, 10 Exch. 222. Those having a right to search for and dig ore on another's land divided their interest into shares. It was held that such shares may be conveyed by parol. *Hanley v. Wood*, 2 Barn. & Ald. 724. The liberty to dig tin and other metals on another's land is a mere license, and conveys no interest in the land. *Hayter v. Tucker*, 4 Kay & J. 249. Shareholders are only interested in the profits of working the mine, and have no interest in the realty. *Powell v. Jessopp*, 18 C. B. 336; *Walker v. Bartlett*, 18 C. B. 845. In *Hills v. Parker*, 7 Jur. (N. S.) 833, a person holding a leasehold interest in salt-works formed a partnership with others to work the wells and make salt. It was held that the partnership had no interest in the estate. In *Burdon v. Barkus*, 3 Giff. 412, the lessee of a coal mine took in a partner to work it for iron-stone and fire-clay. It was held that he could terminate the partnership at his pleasure, because he was alone interested in the lease. In *Dale v. Hamilton*, 2 Phil. 266, C. purchased the land for A. and B., and they entered into partnership with C., and it was agreed that C. should survey and plat the land into lots, and do other work, and try and sell the lots, and when sold, the profits should be divided between them. It was held that no interest in the land passed to C. by the contract. A mere parol license to dig a well on another's land, and carry the water in pipes to his own land, conveys no interest in the land. *Houston v. Laffee*, 46 N. H. 507. If one agrees with the owner of the land to get a railroad located and constructed on it, and to lay it off into lots and make sales, in consideration of half of the profits above cost, he obtains no interest in the land. *Lesley v. Rosson*, 39 Miss. 368. "A colliery and a landed estate are considered quite different by the courts; a colliery being always considered as a trade, the profits of which accruing from day to day belonging to those who work it for the profits thereof." *Steward v. Blakeway*, L. R., 4 Ch. App. 603. "Real estate not purchased by partnership funds, although used for partnership purposes, does not become partnership property, and the title is not affected by such use." *Alexander v. Kimbro*, 49 Miss. 529; *Frink v. Branch*, 16 Conn. 261. "The authority to do an act or series of acts upon the land of another, such as to hunt, remove stone, or cut down trees, is a mere license, and conveys no interest in the land." Browne Stat.

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Frauds, § 26, and cases cited in note. "A parol license to dig minerals on the land of the licensor is valid." 3 Pars. Cont. 39. A third person built a house on the mortgaged premises for the mortgagor on the parol agreement of the mortgagee that he should be paid for it, or have a lien upon it in preference to the mortgage. The agreement was held valid. *Godeffroy v. Caldwell*, 2 Cal. 489. The sale of a mining claim does not affect the title of the land. *Hitchens v. Nougues*, 11 Cal. 29. The owner of the land verbally contracted with two others that they should dig and prospect for coal, and do all the other work to open the mine, and then that they would raise and sell the coal jointly, the profits to be divided equally. It was held a partnership in mining like any other partnerships, only it was not founded on the *delectus personarum*, and that it carried no interest in the land. *Hitchens v. Nougues*, 11 Cal. 29; *Duryea v. Burt*, 28 Cal. 539.

A verbal agreement between two or more to explore and locate and work lodes on government land is not within the statute. *Murley v. Ennis*, 2 Col. 300. A verbal agreement that plaster lands and a plaster-mill should be bought and owned by A. and B. and worked by them as partners, is within the statute; but not so if the land was to be owned by one of them only. *Brosnan v. McKee*, 59 Mich. 107. To this case there is a note of cases of *Snyder v. Wolford*, 33 Minn. 175; *Carr v. Leavitt*, 54 Mich. 540; *Miller v. Kendig*, 55 Iowa, 174. These cases hold that when one person selects lands and contracts with another to purchase and hold them in his own name, and when they are sold the net profits to be divided between them in consideration of his services, the contract is not within the statute. The plaintiff was the owner of a lime-kiln, and it was verbally agreed that the defendant should fill it with limestone and furnish the wood to burn it, and the lime to be equally divided between them. It was held to be a partnership, and the defendant was liable for taking more than his share. *Musier v. Trumpbour*, 5 Wend. 274. A verbal agreement of copartnership was entered into by several persons for the purposes of developing plaster-beds on certain lands, and for getting out and selling plaster and for procuring the title to the lands. The business went on until the lands were finally bought and paid for by the profits of the concern. It was held not to be within the statute. *Godfrey v. White*, 43 Mich. 171. A sale of shares of a mining company working a mine does not convey any interest in the land,

but only in the severed mineral ores, machinery and personal effects. Rog. Mines, 428. A partnership for the purpose of mining for lead ore, irrespective of title to the lands, may be formed by parol agreement and will be treated, in respect to the ore raised, like any other partnership. *Sauntry v. Dunlap*, 12 Wis. 404.

These cases clearly illustrate the principles underlying this contract or partnership in this case. There can no case be found, in my opinion, of similar facts, where it has ever been held that such a contract was within the statute. But there are many respectable authorities which hold that such a contract, even if it went further and provided that the lands themselves should belong to the partnership or be held in trust for the partnership for the purpose of mining or quarrying or milling, etc., was not within the statute. But such is clearly not this case; for there is no provision made for the purchase of the land or any interest in it from the defendant, although there is an averment in the complaint that the defendant held it in trust for the purpose of such quarrying business. This can only mean that the land was to be used by the partnership only for such purpose. It appears very clear, both from reason and authority, that this contract is not within the statute above referred to, and is therefore valid if it could be performed within one year, and not within the other section of the statute.

Was this a contract which by its terms was not to be performed within one year? If it was a contract to form a partnership for the above purposes merely, then it is very clear that it was to be performed at once and without any delay. *Hill v. Palmer*, 56 Wis. 123. An agreement to form a partnership to get out stone and construct certain public works was so far performed that the firm entered upon the business. The contract was held not to be within the one-year statute. *M'Kay v. Rutherford*, 13 Jur. 21; *Hoare v. Hindley*, 49 Cal. 274. But in any view of the case that can be taken on the facts, a contract to form a partnership, or a contract of partnership entered upon nominally and then violated before any thing has been done under it, is not within the statute. The identical point would seem to have been decided by this court in *Ganter v. Atkinson*, 35 Wis. 48. That was a verbal partnership agreement to work a certain mine. They were to begin at a certain point on the land described, and "to have the exclusive right to work and take out all ore found in the drift or in the crevices or openings between the line of the drift and the east boundary line of the land." It was not

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known, and could not be known, how long it would take "to take out all of the ore" in that district, but it might have been supposed that it would take a very long time and the ore to be nearly exhaustless, and was evidently supposed to be a very large and valuable enterprise. But it was sufficient that it was not known, and that the contract might be fully performed within the year. The question in that case was not under this statute, but under the exception to the first above section as of a lease "for a term not exceeding one year," and this court held that the contract was such a lease, and that it did not appear that the term would exceed one year. The question in this case, of very similar facts, is the same in principle. That contract was held to be a lease rather than a license, because it was exclusive of the owner of the land, and valid because the term might end within one year.

A sale of property, with an agreement that the title should remain in the vendor until it was paid for, was held not to be within the statute, in *Esty v. Altrich*, 46 N. H. 127. Although the money was payable at once, yet the time within which it might be paid was indefinite. A. gave B. an equitable interest in a patent-right, and B. was to make the machine practicable, and introduce it into the markets, and then they were to be tenants in common of the right. This contract was verbal, and held not to be within the statute. *Blakeney v. Goode*, 30 Ohio St. 350. "It did not appear that the contract could not be performed within one year." *Greene v. Harris*, 9 R. I. 401. A contract was to take effect at a certain date and continue as long as both parties were satisfied. Held not to be within the one-year statute. *Sherman v. Champlain Transp. Co.*, 31 Vt. 162. This is precisely the case with all partnerships of unlimited time. If the time of performance depends upon a contingency which might happen within the year, the contract is not within the statute, such as a promise to forbear suit as long as a certain person should live. *Wells v. Horton*, 4 Bing. 40. The cases in this court hold that the contract must be such that it cannot be performed within one year, to be void under this statute. *Rogers v. Brightman*, 10 Wis. 65; *Heath v. Heath*, 31 Wis. 223; *Murray v. Abbot*, 61 Wis. 198. Besides this, many of the cases in this court hold that if the contract has been performed within the year by one of the parties, it is taken out of the statute. *McClellan v. Sanford*, 26 Wis. 595; *Coyle v. Davis*, 20 Wis. 564; *Jilson v. Gilbert*, 26 Wis. 637.

It is true that the complaint probably exaggerates the vastness and unlimited extent of this quarry, and on information and belief it is stated that it is exhaustless. But this was a mere strong expression of an expectation of great and lasting profits, to swell the damages in the case. But in the nature of things, the parties could not have known, when the contract was made, that this quarry, so far as any valuable stone in it was concerned, would not be exhausted within one year. It had not been opened yet to ascertain to what extent and for how long a time it might be profitable to work this quarry. It was a partnership that might be dissolved by many contingencies, and the time of its continuance was unlimited.

But I have pursued this subject far enough and much further than necessary, and have made this opinion probably quite too long already. But the questions are very important, and there ought not to be any mistake made about the law in such a case. I have given these questions more attention, and examined the authorities more fully than might appear to have been necessary, because the learned and distinguished counsel for the respondent, with his usual candor, expressed the utmost confidence in his positions on the argument. It would not be safe or seemly to differ with some lawyers who have examined a question in their own cases, and express positive confidence in their own opinions upon it, too hastily, or without much thought and research. But we are clearly satisfied that the contract set out in the complaint is in all respects a valid one and not within any of the provisions of the statute of frauds, and that the complaint states a good cause of action against the defendant.

The Circuit Court erred in sustaining the demurrer.

By the COURT.—The order of the Circuit Court is reversed, and the cause remanded for further proceedings according to law.

Order reversed and cause remanded.

 McFarland v. State.

MCFARLAND V. STATE.

(88 Wis. 400.)

Criminal law—former conviction fraudulently procured—trial of general issue.

A defendant pleaded not guilty and former conviction. It being shown that the former conviction was procured by his fraud and collusion, *held*, (1) that it was void; * (2) that there must be a trial on the general issue.

CONVICTION of selling intoxicating liquors without a license. The opinion shows the case.

Hall & Rogers, for plaintiff in error.

Attorney-General, for defendant in error.

LYON, J. It is a rule of the common law, founded on a plain principle of natural justice, that no person shall be twice put in jeopardy of punishment for the same offense. This rule is embodied and perpetuated in both the Federal and State Constitutions. One application of the rule is that a regular conviction or acquittal upon a prosecution for a crime, if pleaded, is a bar to a second prosecution for the same offense.

But if one, liable to be charged criminally, by fraud procures himself to be acquitted or convicted of the offense, such acquittal or conviction is no bar to another prosecution therefor. Whart. Crim. Pl., § 451. Bishop, in his treatise on Criminal Law, says: "If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment and to bar any future prosecution carried on in good faith, if the proceeding is really managed by himself, either directly or through the agency of another, he is, while thus holding his fate in his own hands, in no jeopardy. The plaintiff State is no party in fact, but only such in name. The judge is imposed upon indeed, yet in point of law adjudicates nothing. * * * The judgment is therefore a nullity, and is no bar to a real prosecution." 1 Bish. Crim. Law, § 1010. It is probable however that if in such collusive and fraudulent prosecution the full penalty of the law for the offense has been

* See *State v. Simpson* (28 Minn. 66), 41 Am. Rep. 269.

imposed and paid or suffered by the accused, it would be a bar to a second prosecution for the same offense.

On this subject the learned Circuit judge instructed the jury as follows: "If the defendant in this case procured the complaint in the case, which has been pleaded in bar, to be made by a person acting in collusion with him, or with the attorney of the defendant with the defendant's sanction, and with the expectation upon the part of the defendant of deriving some benefit from it by getting off better than by another prosecution, or thinking to avoid a prosecution which he thinks may be more serious to him, or with a design to avoid another prosecution the result of which he thinks might be more serious to him, then it is no bar." We think this instruction is a correct statement of the law. The testimony amply supports the verdict of the jury in that behalf. Thus far we find no error in the record.

2. The last sentence of the verdict—"We therefore find the defendant guilty"—is a mere conclusion of law from the finding that the prosecution and conviction before Justice ALLEN was collusive and fraudulent. It is not in any correct sense a verdict of guilty on the merits, and has no significance in the determination of the case. It was but a repetition of the ruling by the court on the trial, to the effect that a conviction of the offense charged must necessarily result from a verdict overruling the plea of *autrefois convict*. This brings us to inquire whether the plaintiff in error was properly convicted of the offense charged, without a trial of the issue of his guilt or innocence, when his plea of not guilty stood upon the record.

In England the rule adopted by the Circuit Court seems to prevail in prosecutions for misdemeanors, and it has been followed to a limited extent in this country; but the great weight of American authority is against it. We do not think the English rule rests upon any sound principle. Why a man should be held to have conclusively admitted himself guilty of an offense for which he is being prosecuted, merely because he avers that he has theretofore been prosecuted for the same offense and acquitted or convicted thereof and fails to prove it, we cannot comprehend. The verdict against him on such special plea is simply that he was not theretofore so acquitted or convicted of the offense charged. By what rule of logic or legal presumption can it be said, that because he asserts an acquittal or conviction therefor, which the jury negatives, he

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conclusively admits his guilt of the offense charged, or must be conclusively presumed guilty thereof? The plea of guilty before Justice ALLEN may perhaps be proved, when the case is tried on the merits, as an admission of the accused, to go to the jury for what it is worth like any other admission of a party against his interest; but to allow the State to repudiate the proceeding before Justice ALLEN, and treat it as a nullity, and still hold that the guilt of the accused is conclusively established by such proceeding, would be most illogical and unjust.

Take another view of the question. The rules governing the two pleas of *autrefois acquit* and *autrefois convict* are the same. *State v. Parish*, 43 Wis. 395. Now suppose one criminally charged pleads that he has theretofore been tried for the same offense and acquitted. The State takes issue on the plea, and the jury find that he has not been so tried and acquitted. The utter injustice, as well as absurdity, of convicting the accused on these proceedings, without further inquiry of the crime charged, is obvious. Such proceedings fail to establish a single element of guilt. Yet the English rule demands and upholds such convictions. We adopt the opposite rule and hold, with most of the courts of this country, that the court erred in pronouncing judgment of conviction without a trial of the issue made by the plea of not guilty. On this subject see Whart. Crim. Pl., §§ 420, 421, 486, and the numerous cases there cited.

By the COURT.—The judgment of the Circuit Court must be reversed; but inasmuch as the issue on the special plea has been regularly determined, the cause will be remanded for a trial of the issue made by the plea of not guilty, unless different pleadings be interposed by leave of that court which will render a trial unnecessary.

NICHOLLS V. STATE.

(98 Wis. 416.)

Criminal law — burglary — constructive breaking.

The defendant, with intent to rob an express car, secreted himself in a box which he procured to be placed in the car by the agents of the express company. *Held*, a constructive breaking.

CONVICTION of burglary. The opinion states the case.

H. W. Barney and John Turner, for plaintiff in error.

Attorney-General, for defendant in error.

CASSODAY, J. There is undisputed testimony on the part of the State to the effect that Saturday, July 25, 1885, the plaintiff in error was stopping at a hotel in Black River Falls, having his name registered as W. H. Eldredge, and a room assigned him opposite thereto. He had then been there about three days. In the afternoon of the day named he had a box or chest taken from the depot to his room, weighing about one hundred and fifty pounds. No evidence was given as to what was in it. About three o'clock in the afternoon of the same day he arranged with the local express agent for the sending of a box to Chicago, then at the hotel, and represented by him as weighing about two hundred and twenty-five pounds. By his prearrangement, the box was brought to the depot just in time for the 7:50 P. M. Chicago train, and was shipped in the express car thereon by the local agent, as directed. Soon after the starting of the train, there seems to have been a suspicion as to the contents of the box. The suspicion was increased as telegrams were received at different stations from Black River Falls, respecting the box. Finally, being convinced by such dispatches that there was a man in the box, the train-men telegraphed forward to Elroy to secure the presence of an officer on the approach of the train to make the arrest. On reaching Elroy, in the night, this box in the express car was opened, and the plaintiff in error was found therein, with a revolver, billy, razor, knife, rope, gimlet and a bottle of chloroform. There was also evidence tending to show that there were packages of money in the custody of the express agent on the car; that such agent had an assistant as

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far as Elroy; that from there to Chicago such car was usually in charge of only one man; that after the arrest, and when asked his object in being thus shipped in the box, the prisoner voluntarily admitted, in effect, that he had considered his chances carefully; that he went into the thing as a matter of speculation; that he needed money, and needed it quickly; that he expected to get fully \$50,000; that had he passed out of Elroy he would have got off with the money; that in a case of that kind, if a human life stood in his way, it did not amount to a snap of the finger.

[Omitting other questions.]

The question recurs whether the proofs show that there was a breaking in fact within the meaning of the statute. Certainly not in the sense of picking a lock, or opening it with a key, or lifting a latch, or severing or mutilating the door, or doing violence to any portion of the car. On the contrary, the box was placed in the express car with the knowledge and even by the assistance of those in charge of the car. But it was not a passenger car, and the plaintiff in error was in no sense a passenger. The railroad company was a common carrier of passengers as well as freight. But the express company was exclusively a common carrier of freight, that is to say, goods, wares and merchandise. As such carrier, it may have at times transported animals, birds, etc., but it may be safely assumed that it never knowingly undertook to transport men in packages or boxes for special delivery. True, the plaintiff in error contracted with the local express agent for the carriage and delivery of such box, but neither he nor any one connected with the express car or the train had any knowledge or expectation of a man being concealed within it. On the contrary, they each and all had the right to assume that the box contained nothing but inanimate substance — goods, wares or merchandise of some description. The plaintiff in error knew that he had no right to enter the express car at all without the consent of those in charge. The evidence was sufficient to justify the conclusion that he unlawfully gained an entrance without the knowledge or consent of those in charge of the car, by false pretenses, fraud, gross imposition and circumvention, with intent to commit the crime of robbery or larceny, and in doing so, if necessary, the crime of murder. This would seem to have been sufficient to constitute a constructive breaking at common law, as defined by Blackstone, thus: "To come down a chimney is held a burglarious entry; for that is as

much closed as the nature of things will permit. So also to knock at the door, and upon opening it, to rush in with a felonious intent; or under pretense of taking lodgings, to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house. All these entries have been adjudged burglarious, though there was no actual breaking, for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process. And so if a servant opens and enters his master's chamber door with a felonious design; or if any other person, lodging in the same house or in a public inn, opens and enters another's door with such evil intent, it is burglary. Nay if the servant conspires with a robber and lets him into the house by night, this is burglary in both; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt." 4 Bl. Com. 226, 227.

So it has frequently been held in this country that "to obtain admission to a dwelling-house at night, with the intent to commit a felony, by means of artifice or fraud or upon a pretense of business or social intercourse, is a constructive breaking, and will sustain an indictment charging a burglary by breaking and entering." *Johnston v. Comm.*, 85 Penn. St. 54; s. c., 27 Am. Rep. 622, and 82 Penn. St. 306; *State v. Wilson*, 1 N. J. Law, 439; s. c., 1 Am. Dec. 216; *State v. McCall*, 4 Ala. 643; s. c., 39 Am. Dec. 314; Bish. Stat. Crimes, § 312, and cases there cited. The same was held in Ohio under a statute against "forcible" breaking and entering. *Ducher v. State*, 18 Ohio, 308. But it is claimed that in this State the common-law doctrine of constructive breaking has no application to a case of this kind, and in fact is superseded by statute, except in so far as it is re-affirmed. Thus: "Any unlawful entry of a dwelling-house or other building with intent to commit a felony, shall be deemed a breaking and entering of such dwelling-house or other building within the meaning of the last four sections." R. S., § 4411. This section merely establishes a rule of evidence whereby the scope of constructive breaking is enlarged so as to take in "any unlawful entry of a dwelling-house or other building with intent to commit a felony." See *State v. Kane*, 63 Wis. 262. It in no way narrows the scope of constructive breaking, as understood at common law, but merely enlarges it in the particulars named. In all other respects such constructive breaking signifies

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the same as at common law. It necessarily follows that as the word "break," used in section 4410, had obtained a fixed and definite meaning at common law when applied to a dwelling-house proper or other buildings within the curtilage, the legislature must be presumed to have used it in the same sense when therein applied to other statutory breakings. *Ex parte Vincent*, 26 Ala. 145; s. c., 62 Am. Dec. 714; Bish. Stat. Crimes, §§ 7, 88; *Ducher v. State*, *supra*. That is to say, they must be deemed to have used the word as understood at common law in relation to the same or a like subject-matter. We must hold the evidence sufficient to support the charge of breaking.

By the Court.—The judgment of the Circuit Court is affirmed.

Judgment affirmed.

WASHBURN V. DOSCH.

(88 Wis. 436.)

Contract—restraint of trade—statute of frauds—not to be performed in a year—executed.

An agreement, upon the sale of a stock of goods and the good-will of a business, not to re-engage in that business in the same village for five years, is valid.*

An oral contract fully executed by one at the time of making is not within the statute of frauds, although by its terms not to be performed by the other within a year.

ACTION on a promissory note. The opinion states the case. The defendant had judgment below.

John D. Wilson, for appellant.

Brooks & Dutcher, for respondent.

CASSODAY, J. [Omitting minor points.] The good-will of an established and successful business is undoubtedly of much value to the possessor of such business, and may be sold with it. *Wallingford v. Burr*, 17 Neb. 137, and cases there cited. But while such sale will entitle the purchaser to a certain limited protection, it will not of itself alone be sufficient to preclude the seller from engaging in a separate and independent business of the same kind in the

* See *Diamond Match Co. v. Roeder*, *ante*, 464.

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same village or city. *Pearson v. Pearson*, L. R., 27 Ch. Div. 145, overruling *Labouchere v. Dawson*, L. R., 13 Eq. 322, in so far as it held that such seller so engaged must not solicit the customers of the old business to give their custom to himself. See also *Cottrell v. Babcock P. P. M. Co.*, 54 Conn. 123; *Bergamini v. Bastian*, 35 La. Ann. 60; s. c., 48 Am. Rep. 216. In order to preclude the seller from engaging in such separate and independent business, there must be an agreement to that effect based upon a good and valuable consideration and not contrary to law or public policy.

The evidence seems to be sufficient to support the finding, that as a part of the contract of sale, the plaintiff agreed with Dosch not to again engage in the dry-goods and grocery trade in the village for a period of five years. The evidence is undisputed that he broke such agreement, if he ever made it. Manifestly, the purchase was made with the expectation of both parties that Dosch would continue the same business for the period of at least five years, in the same village and in the same building; for he not only purchased the goods, furniture and fixtures therein, but took from the plaintiff a contemporaneous lease of the building for the period named. There was evidence tending to prove, that as an inducement to Dosch to make the sale, the plaintiff spoke of the goodwill of the business and placed a high estimate upon its value. That value consisted largely in the probability of the plaintiff's former customers thereafter giving their trade to Dosch at the same store. Of course that probability would be very much strengthened, and such value correspondingly increased by including in the contract of sale a binding agreement upon the part of the plaintiff to abstain thereafter from engaging in the same business in the same village. In the language of BRET, M. R., "such a contract added an indelible feature to the business, and increased the value of the goodwill." *Jacoby v. Whitmore*, 49 Law T. (N. S.) 337; 28 Alb. L. J. 510. This being so, such an agreement would necessarily be a very substantial inducement to the purchaser to make such purchase, and to pay or agree to pay the price named. These things being so, we think the jury were warranted in finding that the plaintiff made such agreement in consideration of the purchase.

That agreement was in no sense an absolute restraint upon trade. The plaintiff was still at liberty to engage in any and every other kind of business in the same village. He was moreover still at liberty to engage in the same business in any other village or city

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in this or any other State. The agreement therefore, was only for a partial or limited restraint upon the plaintiff as a tradesman, and not upon trade generally. *Kellogg v. Larkin*, 3 Pin, 141; s. c., 56 Am. Dec. 172. Such restraining of one person from doing a particular class of business in a particular place left the field of competition free and open to everybody else. It merely took from one individual the right to resume the beneficial use of what he had himself already disposed of for value to another.

The enforcement of such an agreement is not contrary to public policy. *Dwight v. Hamilton*, 113 Mass. 175; *Burrill v. Daggett*, 77 Me. 545; *Fairbank v. Leary*, 40 Wis. 637. Such restriction did not extend beyond what was necessary for the protection of Dosch in the enjoyment of the trade, business and good-will which he so purchased from the plaintiff, and under the authorities, it was reasonable, and hence permissible. *Dunlop v. Gregory*, 10 N. Y. 241; *Doutelle v. Smith*, 116 Mass. 111. "The restriction which it imposes," said GRAY, C. J., in the case last cited, "is confined to a particular place, and is but co-extensive with the interests purchased." We must hold that the contract was based upon a good consideration, and not void as being against public policy.

Was the agreement void because it rested in parol and by its terms was not to be performed within one year from the making thereof? R. S., § 2307, subd. 1. Upon this question courts are divided. Several years ago, and after mature deliberation, this court concluded to follow the rule sanctioned in England and several of our sister States, instead of the one adopted in New York and some of the New England States. *McClellan v. Sanford*, 26 Wis. 609. The cases are there classified. See also *Jilson v. Gilbert*, 26 Wis. 637; s. c., 7 Am. Rep. 100; *Treat v. Hiles*, 68 Wis. 344. The rule thus sanctioned by this court is to the effect, that, although the agreement by its terms is not to be performed by one of the parties thereto within one year from the making thereof, yet, if it is based upon a good and valuable consideration, received by such party and executed by the other party at or before the time of the making of such contract, then the case is thereby taken out of the statute, and may be enforced. To use the language of DIXON, C. J., in the leading case cited, the statute "applies only to contracts not to be performed on either side within the year." The rule thus sanctioned by this court was recently applied in Iowa to a case where the agreement was to refrain from doing a particular

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kind of business in a particular place. *Smalley v. Greene*, 52 Iowa, 241; s. c., 35 Am. Rep. 247. It follows that the contract was binding upon the plaintiff.

We find no error in the rulings of the court upon matters of evidence, nor in giving instructions to the jury. The exceptions in these regards are sufficiently covered by what has already been said.

By the COURT. — The judgment of the Circuit Court is affirmed.

Judgment affirmed.

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(88 Wis. 465.)

Agency — warranty of chattels — evidence of custom.

An agent to sell chattels has no implied authority to warrant, in the absence of custom, but proof of a custom to warrant is competent.

ACTION on account for goods. Defense, breach of warranty of other goods. The opinion shows other facts. The defendant had judgment below.

Bleskman, Tourtellotte & Bloomingdale, for appellant.

C. L. Hood, for respondents.

CASSODAY, J. The evidence is undisputed that the fish were in good condition when shipped to the defendants from Boston, and worthless when they reached the defendants at La Crosse. The defendants made the contract of purchase at La Crosse with the plaintiff's travelling salesman, who resided at Chicago. There was evidence tending to prove that the fish shipped were not the fish ordered; and also that by the terms of the contract the fish ordered were guaranteed by the travelling salesman to reach the defendants in La Crosse in good merchantable condition. The evidence on the part of the plaintiff was to the effect that the travelling salesman had no authority to make such guaranty, nor any assurance as to the condition in which the fish should be on reaching La Crosse; and that he so informed the defendants about a month prior to the taking of the order in question. The issue made does not arise between the principal and agent, but between the principal and the defendants who made the contract of purchase with the agent. The agency

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and the right to contract for the sale are admitted. But the authority to make the guaranty or warranty is denied. Beyond question, an agent may bind his principal if he does not exceed the power with which he is ostensibly invested, notwithstanding he has secret instructions from his principal to the contrary. *Putnam v. French*, 53 Vt. 402; s. c., 38 Am. Rep. 682; *Bentley v. Doggett*, 51 Wis. 224; s. c., 27 Am. Rep. 827; *Bouck v. Enos*, 61 Wis. 664. Assuming that the travelling salesman had no actual authority to make such guaranty or warranty of the fish, then it became important to determine whether his authority to sell or contract for the sale clothed him with an implied authority to make such guaranty or warranty. "The general rule is, as to all contracts, including sales," said a late learned author, "that the agent is authorized to do whatever is usual to carry out the object of his agency, and it is a question for the jury to determine what is usual. If in the sale of the goods confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale." 2 Benj. Sales (4th Am. ed.), § 945, p. 824. The text is supported by the citation of numerous authorities. See *Bayliffe v. Butterworth*, 1 Exch. 425; *Graves v. Legg*, 2 Hurl. & N. 210; *Dingle v. Hare*, 97 Eng. C. L. 145; *Upton v. Suffolk Co. Mills*, 11 Cush. 586; s. c., 59 Am. Dec. 163; *Herring v. Skaggs*, 62 Ala. 180; s. c., 34 Am. Rep. 4; *Smith v. Tracy*, 36 N. Y. 82; *Ahern v. Goodspeed*, 72 N. Y. 108.

Thus in *Dingle v. Hare*, *supra*, ERLE, C. J., observed: "The strong presumption is that when a principal authorizes an agent to sell goods for him he authorizes him to give all such warranties as are usually given in the particular trade or business;" and BYLES, J., added: "An agent to sell has a general authority to do all that is usual and necessary in the course of such employment." So in *Smith v. Tracy*, *supra*, PORTER, J., speaking for the court, said: "The rule applicable to such a case is stated with discrimination and accuracy in our leading text-book (Parsons) on the law of contracts: 'An agent employed to sell, without express power to warrant, cannot give a warranty which shall bind the principal, unless the sale is one which is usually attended with warranty.'"

Here the plaintiff offered to prove, by different witnesses having the requisite knowledge, the general custom of the trade as known and universally followed by dealers in fish, as to their being warranted or guaranteed against spoiling or turning red in transit; but it was excluded, and as we think erroneously, under the rules of

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law above stated. It would seem however that to be binding upon the defendants, such custom should be known to them or exist in their section of the country. Thus in *Graves v. Legg, supra*, it was said by COCKBURN, C. J.: "The only question is whether, when a merchant residing in London contracts with a Liverpool merchant in Liverpool, he is bound by the usage of trade at Liverpool. We think that as he employed an agent at Liverpool to make a contract there, it must be taken to have been made with all the incidents of a contract entered into at Liverpool, and one is that notice to the buyer's agent, is notice to the principal."

By the COURT.—The judgment of the Circuit Court is reversed, and the cause is remanded for a new trial.

Judgment reversed and cause remanded.

FICK V. CHICAGO AND NORTHWESTERN RY. CO.

(83 Wis. 468.)

Master and servant—scope of employment—willful assault.

A railway ticket-agent left another employee in charge of the ticket office. He returned to a purchaser too little change, and on being asked for it, assaulted him. *Held*, that the company was liable. (*See note, p. 880.*)

ACTION for assault. The opinion states the facts. The plaintiff had judgment below.

Jenkins, Winkler, Fish & Smith, for appellant.

Bleekman, Tourtellotte & Bloomingdale, for respondent.

COLE, C. J. The plaintiff had purchased a ticket at the ticket office at Wilton for his transportation to Norwalk, so the relation of carrier and passenger existed at the time of the assault. It is needless to say that the company and its agents owed him fair and proper treatment while this relation existed. The jury found that one Fred E. Davis was the station agent at Wilton when the ticket was purchased; that Edward W. Davis was employed at Wilton to carry the mail from the trains to the post-office, and was employed in no other capacity; that at the time in question the plaintiff purchased of Edward W. Davis, temporarily in the ticket office at

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Wilton by permission of Fred E. Davis, a ticket to Norwalk, the price of which was twenty cents, and tendered him fifty cents in payment thereof; that Edward W. Davis returned to the plaintiff too small an amount of change, and informed him that they had no change and would either send it to him or hand it to him when he came again; that Edward W. Davis committed the first assault upon the plaintiff at this time; and that the plaintiff was intoxicated.

Upon these simple facts, the conduct of the employee, Edward W. Davis, in assaulting the plaintiff would appear to be wholly indefensible and without any legal excuse. The plaintiff had given him money to pay for his ticket, and he was entitled to have his correct change returned. It was natural that he should ask for it and persist in demanding it. The agent had no possible right or justification for assaulting him because he did insist upon the correct amount of change being returned. Of course, the defendant owed the plaintiff the duty of treating him respectfully and properly. Certainly it was bound to protect him against the violent acts or misconduct of its agents. There would probably be no controversy as to the correctness of this view of the law, or as to the liability of the defendant for the willful act of a servant while acting in the course of his employment.

It is said that Edward W. Davis was not the station agent at Wilton, but was merely employed to carry the mails from the trains to the post-office, and was employed in no other capacity. But he was in the ticket office, sold the plaintiff a ticket, and received pay therefor. It is alleged in the complaint that the plaintiff went to the station for the purpose of taking passage on the train due in a few minutes, and purchased a ticket of an employee in charge of the office. Now, while it may be true that Edward W. Davis was not the regular ticket agent, yet under the circumstances he must be regarded as authorized to issue the ticket. The special verdict finds that at this time the "fracas" occurred, or the unlawful assault was committed. Now to say that Edward W. Davis was a servant of the defendant in selling the ticket and receiving pay for it, but while in the act of refusing to return the proper change and in making the assault was acting outside the course of his employment, is refining too much upon the transaction. It is not as though the fracas had occurred at a subsequent time and place disconnected with the act of selling the ticket and making change.

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Of course, the rule is familiar that the master is liable for the torts of his servant only when they are committed in the course of his employment, and we do not intend to disregard that rule here. It is often difficult to determine what acts should be deemed within the course of the employment; but it seems to us, upon the facts, that the assault made upon the plaintiff is one for which the defendant is liable. It would be unjust to hold that the defendant, which was bound to use all due diligence to carry the plaintiff safely to his destination, was not bound to protect him against the violent act of its servant under the circumstances of the case. True, the jury, in answer to the fourteenth question, find that the striking of the plaintiff by Edward W. Davis was not done by him in the course of his employment. But this, in view of the other findings, amounts only to a conclusion of law, and is not controlling as to the fact. It is like the question presented in *Hogan v. C. M. & St. P. R. Co.*, 59 Wis. 139, where it was held that if the special findings by the jury and the averments of the complaint conclusively show that the defendant was free from any negligence causing the injury complained of, a finding in the verdict that the defendant was guilty of such negligence will be treated merely as an erroneous conclusion of law, and will have no weight in determining what judgment should be entered. So here, where the other findings show that Edward W. Davis was acting in the course of his employment when he committed the unlawful act complained of, the fourteenth finding must be treated as an erroneous conclusion of law, which can have no weight in determining what judgment shall be entered.

By the COURT. — The judgment of the Circuit Court is affirmed.

Judgment affirmed.

NOTE BY THE REPORTER. — See *Noblesville, etc., Co. v. Ganse*, 76 Ind. 142, s. c., 40 Am. Rep. 142, and note. 226. That note collected the cases in this series up to that point.

The following may be added: *In course of employment.* Where conductor or brakeman kicked a boy from train who was stealing a ride; *Hoffman v. N. Y. Cent., etc., R. Co.*, 87 N. Y. 25; s. c., 41 Am. Rep. 337. Where a ferry-boat pilot took a canal boatman without compensation, agreeing to put him on his boat in a passing tow; *Quinn v. Power*, 87 N. Y. 535; s. c., 41 Am. Rep. 392. Where passenger accused brakeman of stealing his watch, and brakeman struck him; *Chicago & E. R. Co. v. Fleisman*, 103 Ill. 546; s. c., 42 Am. Rep. 53. Where law clerk of railroad company tries to bribe a witness; *Chicago City Ry. Co. v. McMahon*, 103 Ill. 485; s. c., 42 Am. Rep. 29. Where conduc-

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tor employs a surgeon for injured brakeman, at a distance from chief office and in absence of superior; *Terre Haute & Ind. R. Co. v. McMurray*, 98 Ind. 358; s. c., 49 Am. Rep. 752. Where hands on locomotive engine threw off a trespasser while at dangerous speed; *Carter v. Louisville, etc., Ry. Co.*, 96 Ind. 552; s. c., 49 Am. Rep. 780. Where railroad detective arrests innocent person; *Evansville, etc., R. Co. v. McKee*, 99 Ind. 519; s. c., 50 Am. Rep. 102. Where railway conductor assaults person on cab of freight train, treating for passage; *Western & Atlantic R. Co. v. Turner*, 72 Ga. 292; s. c., 53 Am. Rep. 842. Where foreman of a corporation directed workman to open a ventilator during noon rest; *Broderick v. Detroit Union Depot Co.*, 56 Mich. 261; s. c., 56 Am. Rep. 382.

Where railroad conductor requests shipper's servant to assist in coupling car to facilitate loading; *Eason v. S. & E. T. Ry. Co.*, 65 Tex. 577; s. c., 57 Am. Rep. 606. Where driver of street-car requests passenger to assist him in backing car on turn-out; *Street Ry. Co. v. Bolton*, 43 Ohio St. 224; s. c., 54 Am. Rep. 808. Where a brakeman ordered boy trespassing on freight train to jump off while it was moving rapidly. *Kansas City, etc., R. Co. v. Kelly*, 36 Kans. 655; s. c., 59 Am. Rep. 596.

In *Harriman v. Pittsburgh, etc., R. Co.*, Supreme Court of Ohio, March 22, 1887, the question was of the liability of the defendant for injury by an explosion of a torpedo placed on the track by the defendant's servants. The court said:

"It remains to be considered whether from the statements of the amended petition, the acts and conduct of the defendant's agents and servants, constituting the negligence therein charged, were so within the scope of their employment as to make the defendant liable for the injuries thereby done to the plaintiff. It is claimed they were not, because it is alleged that the torpedoes were wantonly placed upon the defendant's track by its servants when and where there was no necessity or occasion for their use. It appears from the pleading 'that the defendant, in using and operating its roads and trains,' carried these torpedoes on its trains to be used by its servants in the management and operation of its trains; that the defendant's servants, then engaged in the management of one of defendant's trains having torpedoes upon it, took these torpedoes from the train, and while so in the control and management of the train, wantonly placed them on the track; 'that defendant so carelessly and negligently conducted itself in the management of its said train of cars that it carelessly failed to explode and destroy all of the torpedoes, but negligently left one exposed and unexploded on its track,' etc.

"The railroad company, having intrusted to its servants the control and management of its train of cars, and the custody of these dangerous explosive articles to be used by them on its road, in the operation and management of the train, necessarily confided to some extent in the judgment and discretion of the servants in their use. The authority to the servants was to use the torpedoes on the road in the management of the train. The real ground for claiming that the defendant is not liable is that they were used at a time and in a manner not within their instructions or authority. But the defendant must be held to have taken upon itself the risk of errors of judgment on the

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part of the servants, and in the exercise of the discretion confided to them, and to be liable for their misjudgment and abuse of discretion in the use of them. Nor does the fact that the conduct of the servants, constituting the negligence complained of, was a violation of their duty to the defendant, or was needless, reckless or wanton, exonerate the defendant. A master does not ordinarily authorize or expect negligence in the servant. Reasonable care and fidelity in his employment is a part of the servant's engagement, and every act of negligence on his part is in some sense a violation of his duty to the master, and a deviation from his authority.

"The case of *Hoffman v. New York Cent., etc., R. Co.*, 87 N. Y. 25; s. c., 41 Am. Rep. 397, so accords with our views on this subject that we forbear any extended review of the numerous other cases sustaining them. In that case the plaintiff, a boy eight years of age, jumped on the steps of a car in a passenger train upon the defendant's road, and sat down upon the platform of the car. He was kicked from the car by the conductor or brakeman while the car was running at a speed of about ten miles an hour, and was injured. By the regulations of the defendant, in force at the time, the conductor had charge of the train, and was responsible for its safe and proper management, and brakemen and other servants thereon were subject to his orders. He was authorized to remove from the cars persons who should refuse to pay their fare, or were drunk, riotous or unruly; but must be governed by the provisions of the law in so doing. The law then in force provided that 'if any passenger shall refuse to pay his fare it shall be lawful for the conductor to put him and his baggage out of the car, using no unnecessary force, at any usual stopping place, or near any dwellings, on stopping the train.' It was held that the defendant was liable, and in the opinion of the court, ANDREWS, C. J., says: 'Assuming the case made by the plaintiff, the act (of kicking him from the car) was flagrant, reckless and illegal; but the point is, was it within the scope of the employment? The removal of trespassers from the cars was, as we hold, within the implied authority or the defendant's servants on its train. The fact that they acted illegally in removing the plaintiff while the train was in motion does not exonerate the defendant. * * * No doubt the kicking of the boy off the car was not only a wrong to the plaintiff, but was a violation of the duty which the train servants owed to the defendant to exercise proper care in executing the authority confided to them; but in most cases where the master has been held liable for the acts of the servant, the tortious act was a breach of the servant's duty. In this case authority to remove the plaintiff from the cars was vested in the defendant's servants. The wrong consisted in the time and mode of exercising it. For this the defendant is responsible, unless the brakeman used his authority as a mere cover for accomplishing an independent and wrongful purpose of his own.'

"So it may be said in this case that at most it appears that the defendant's servants, while acting in its business and within the scope of their employment, deviated from the line of their duty to the defendant, and disobeyed its instructions. In so deviating, while they may have disregarded their instructions, they were still doing their employer's work, though not according to their instructions. And see *Quinn v. Power*, 87 N. Y. 535; s. c., 41 Am. Rep. 392."

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Not in course of employment. Where foundry engineer removed hot ashes given him by employer to sell for himself; *Burke v. Shaw*, 59 Miss. 448; s. c., 43 Am. Rep. 370. Where railway section-men damaged adjoining property by a fire kindled to cook their meals; *Morier v. St. Paul, Minn. & Man. Ry. Co.*, 31 Minn. 351; s. c., 47 Am. Rep. 798. Express wagon driver authorized to do for himself, and injuring a person in that business; *Mulochill v. Bates*, 31 Minn. 364; s. c., 47 Am. Rep. 796. Where railway road-master in charge of repairs contracts for nursing of person injured on line, there being no emergency and a superior within reach; *Louisville, etc., Ry. Co. v. McVay*, 98 Ind. 391; s. c., 49 Am. Rep. 770. Where hostler immoderately rode a horse boarded by his employer; *Adams v. Cost*, 63 Md. 264; s. c., 50 Am. Rep. 211. Where railroad division-superintendent employs surgeon for injured passenger; *Union Pac. Ry. Co. v. Beatty*, 35 Kans. 265; s. c., 57 Am. Rep. 160.

See notes, 41 Am. Rep. 340; 42 Am. Rep. 36; 43 Am. Rep. 32; 50 Am. Rep. 106; 59 Am. Rep. 601.

The following is an abstract of *Charleston v. London Tramways Co., Limited*, Q. B. Div., Dec. 12, 1887: On the 30th of November, 1886, the plaintiff was a passenger in one of the defendant's tramcars. When the conductor of the car applied to her for her fare she gave him half a crown, and received from him 2s. 4d., the fare being 2d. When she was about to leave the car the conductor stopped her, and told her that she could not leave, as she had given him a bad half-crown. She was then taken on in the car past her destination until the car arrived near a police station. She was then taken out by the conductor, and taken by him to the police station, and was there charged before an inspector of police with giving a bad half-crown in payment of her fare. The half-crown was tested by the police inspector, and found to be good, and the plaintiff was thereupon discharged. She brought the present action against the tramways company for trespass and false imprisonment, and the case was tried before STEPHEN, J., and a special jury, when a verdict and judgment were entered for the plaintiff for £100 damages, the learned judge holding, that notwithstanding the rules of the company, the conductor had an ostensible authority to do what he did, to detain the plaintiff and give her into custody. The defendants now moved for a new trial, or that judgment should be entered for them on the ground that there was no evidence to go to the jury of the defendants' liability for the acts of their conductor, and that the judge ought to have directed the jury that the conductor was not acting within the scope of his employment, and that the defendants were not liable, as the conductor had acted in contravention of the defendants' express orders and to protect his own interests. Section 51 of the Tramways Act, 1870, provides that every person defrauding the company in the payment of the fare shall be liable to a penalty not exceeding forty shillings; and section 53 provides that it shall be lawful for any officer or servant of the promoters or lessees of any tramway * * * to seize and detain any person discovered either in or after committing or attempting to commit any such offense as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or otherwise discharged by due course of law. In a

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book of rules and regulations for the officers and servants of the company, relating to the conductor, are the following rules: Rule 11. "Passengers offering bad money in payment of fare. Coin must be kept quite apart from other money, and in presence of passenger tested. If bad, the passenger refuses good coin, having other money in his possession, he may be charged under the authority of an inspector or timekeeper." Rule 16. "Except in cases of assault, conductors are not to give passengers into custody without the authority of an inspector or timekeeper." Also the following rule: "A conductor shall be responsible for (8) all counterfeit and foreign coin received." *Held*, that taking into consideration the rules supplied to the conductor, it was not within the scope of his authority to give any person into custody, except for assault, without the authority of an inspector or timekeeper; and in so giving the plaintiff into custody he was acting *ultra vires*, and that the defendants were not liable.

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(88 Wis. 587.)

Bankruptcy — discharge — judgment pending proceedings.

A judgment obtained pending bankruptcy proceedings, on a claim provable therein, is released by the bankrupt's discharge.*

ACTION for injunction. The opinion states the case. The defendant had judgment below.

W. P. Bartlett, for appellant.

F. F. Frawley and *V. W. James*, for respondent.

ORTON, J. The plaintiff by his first complaint alleged as follows: The firm of Leonard, French & Giddings, of which the plaintiff was a member, was indebted to the defendant Yohnk in the sum of about \$2,400, and on the 7th day of December, 1869, Yohnk commenced an action thereon against said firm in the Circuit Court of Eau Claire county. On the 13th day of December, 1869, the said firm filed their petition in bankruptcy, and were declared bankrupts accordingly, and afterward the said Yohnk, with the other creditors of said firm, filed and proved said claim against the bankrupt estate, as it was provable according to the bankrupt law. On January 7, 1870, the said Yohnk obtained a judgment in

* See *Bowen v. Eichel* (91 Ind. 22), 46 Am. Rep. 574.

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the above action against said firm by default for the sum of \$2,426.76, and afterward filed and proved said judgment as a provable claim against said bankrupt estate. On the 23d day of February, 1886, Yohnk caused an execution to be issued on said judgment, and thereafter the said defendant Cosgrove, as sheriff, levied the same upon certain property belonging to the said plaintiff, and which he had acquired since the commencement of said bankruptcy proceedings, to satisfy said execution, and advertised the same for sale. On the 26th day of February, 1886, the plaintiff petitioned the bankrupt court for a discharge in said bankruptcy, and an order to show cause why he should not be so discharged was entered to be heard on the 21st day of June thereafter, and the same was duly served upon said Yohnk. Thereupon this action was brought by the plaintiff to enjoin the proper parties from proceeding further under said judgment and execution, and such an injunction was granted.

On the 24th day of June, 1886, the plaintiff obtained his discharge in said bankruptcy in due form of law, and thereupon, by a rule to show cause, moved the court for leave to file a supplemental complaint in said action, setting up said discharge and praying a perpetual injunction of any proceedings on said judgment and execution. In the meantime the defendants had filed a demurrer to said first complaint on the ground of want of jurisdiction and of no cause of action. Both the motion and the demurrer were heard at chambers, and the motion was denied, and the demurrer sustained. From the orders of the Circuit Court refusing to set aside the orders so denying the motion and sustaining the demurrer, this appeal is taken. The facts of this case raise the question which is in such irreconcilable conflict in the State courts. In the following States it is held that by a subsequent discharge in bankruptcy, if a judgment is obtained by a creditor upon a claim provable under the bankrupt law, in an action commenced before or after the commencement of the bankruptcy proceedings, and pending such proceedings the bankrupt is discharged from the judgment itself, the same as from the claim upon which it was founded: New York, Georgia, Vermont, Indiana, Michigan, Mississippi, Tennessee, Virginia, North Carolina, Arkansas, Kansas, Alabama, California and perhaps some other States. In Massachusetts and Illinois and some other States it is held that such a judgment is not affected by the discharge. It is contended by the learned counsel of the respondent

that many of the cases in which it is held that both the judgment and the claim are barred by the discharge arose under the bankrupt law of 1841, which did not contain the provision requiring the State court to stay proceedings in such a case before judgment, upon the application of the bankrupt, found in the bankrupt law of 1867, in Rev. Stat. U. S., § 5106. But it is significant that the same conflict of decisions upon this question still exists, notwithstanding this new provision. This provision imposes a duty upon the State courts, which they may or may not discharge, notwithstanding its imperative language: "And any such suit or proceeding shall upon the application of the bankrupt be stayed, to await the determination of the court in bankruptcy on the question of the discharge, provided there is no unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge." The reason for this provision, given by the learned judge who wrote the opinion in *Boyn-ton v. Ball*, 105 Ill. 634, was "to prevent a judgment which the discharge might not relieve the bankrupt from, as held by the courts of Maine and Massachusetts," etc. This reason evidently comes from a desire to sustain the ruling of the Illinois courts upon the main question. If there had been no conflict in the decisions of the various courts of this country under the law of 1841 against the rule that such intermediate judgment is not released or affected by the discharge, and all courts had agreed with the Supreme Court of Illinois, there might be some ground for the reason given. But when Congress must have been aware that there was a preponderance of the weight of authority in this country, and that the decisions of the English courts were uniform, against such a rule, such a reason for the provision could have had but little weight. A far better reason would have been, and probably was, that the bankrupt, after his discharge, might not be put to the trouble and expense of relieving his subsequently-acquired property from the lien of, and a threatened seizure under, intermediate judgments, obtained in violation of the bankrupt law, pending his bankruptcy proceedings. This provision makes it easier and less expensive to prevent such judgments and the threatened mischief, than to set them aside after such mischief had been wrought.

It may be well to consider briefly the effect of this new provision. Under the law of 1841 the bankrupt certainly had the right to go into the State court and ask for a stay of the proceedings on the

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same ground, and such court had the power and discretion to stay the proceedings if there had been no unreasonable delay in obtaining his discharge. Neither the bankrupt nor the State court can do any thing more now under this provision. The pendency of the bankrupt proceedings would have been no defense to the action then, and it is no defense now. The proceeding is only dilatory and discretionary at most. If the bankrupt could thereby absolutely prevent a judgment from being rendered, it would be different and quite effectual. But as it is the remedy is quite inadequate. There are two previous provisions that ought to be and are more effectual. The first is applicable in all respects to this case: "No creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him; and all proceedings already commenced, or unsatisfied judgments already obtained, against the bankrupt, shall be deemed to be discharged and surrendered thereby." Rev. Stat. U. S., § 5105. In this case the suit was commenced before the proof of the debt in bankruptcy. "In such a case the proving of the debt operates as a surrender, *ipso jure*, of the action, and is a bar to any further proceedings in the suit." Bump Bankr. 684; *Everett v. Derby*, 5 Law Rep. 225. The other provision is as follows: "No creditor whose debt is provable shall be allowed to prosecute to final judgment any suit at law or in equity therefor against the bankrupt until the question of the debtor's discharge shall have been determined." Section 5106. These provisions together contain prohibitions against the creditor maintaining or prosecuting any such action to judgment, and it is therefore unlawful for the creditor to do so. Such judgments are obtained in violation of the bankrupt law. Now what is the result if the creditor shall, notwithstanding such prohibition, maintain or prosecute such an action to judgment, or if the State court should see fit to deny, as it may, such application for a stay of proceedings? Are the judgments so obtained nevertheless valid, effectual and conclusive? If so, then these provisions are nugatory and of no force or effect whatever. These provisions do not affect, and were not intended to affect, the jurisdiction of the State courts in such actions; but they do affect, and were intended to affect, the conduct of the creditor. He has proceeded in violation of law. As to him the judgment ought not to be effectual against the proceedings and discharge in bankruptcy.

He was prohibited by the law from obtaining judgment. He is prohibited, by the spirit and effect of the same law, from availing himself of such judgment by enforcing it, by execution or otherwise, against the discharge in bankruptcy. This would seem to be the proper effect of these provisions. If in the event the bankrupt fails to obtain his discharge, then he is not injured. If he obtains his discharge, then he may assert it as against the judgment so unlawfully obtained.

But I have wandered sufficiently in attempting to discover the reason of the provisions. Their effect is not remedial. They cannot be interposed as a defense to the action. In view of them the State court may stay the proceedings or may refuse to do so. Not so however as to judgments obtained after the discharge in bankruptcy. In such cases the discharge may be pleaded in bar of the actions or as a complete defense. That class of cases therefore which holds that such judgments are conclusive is inapplicable to this case. It is conceded in the opinion in *Boynton v. Ball, supra*, that the English authorities are uniform upon this question that such a judgment is released by the subsequent discharge, but it is said that the English courts are forced to so hold by the provision of the English bankrupt law, that if the debtor is arrested on execution he may be discharged on motion. A broader provision than that is found in the law of 1867, which is that the debtor shall not be liable to arrest in any such action (R. S. of U. S., § 5107), and if arrested, it follows of course that he may be discharged.

The legal effect of the proceedings in bankruptcy and of the discharge upon pending actions by the creditors upon proved and provable claims and upon intermediate judgments, would seem to present a Federal question, for the authoritative decision of the Federal courts. I have been unable to find any case in point decided by the Supreme Court of the United States, except the late case of *Palmer v. Hussey*, 119 U. S. 96, in which the judgment of the Court of Appeals of New York, giving such effect to a subsequent discharge in bankruptcy upon an intermediate judgment of the Supreme Court of that State, is affirmed. That case was much like the present one. Hussey filed his petition on the 20th day and was adjudicated a bankrupt on the 24th day of January, 1868. On the 18th day of April, 1874, Palmer obtained a judgment against Hussey for about \$22,000 upon a claim which was finally determined to have been provable in the bankruptcy, in

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a suit commenced the 7th day of September, 1868. On the 17th day of May, 1880, Hussey obtained his final discharge, and on the 12th day of June, 1880, he moved the Supreme Court of New York to perpetually enjoin the collection of the judgment because of such discharge. That court denied the motion, on the ground that the debt on which the judgment was obtained was not such a one as could be released by the discharge in bankruptcy. The Court of Appeals reversed this order, and held the judgment released, in accordance with the uniform decisions of that court since *Clark v. Rowling*, 3 N. Y. 216, after holding that such debt was one provable under the bankrupt law and which was released by the discharge, and the execution of the judgment was perpetually enjoined. On writ of error the Supreme Court affirmed the judgment of the Court of Appeals. One of the Federal questions raised in the case was as to the fraudulent and fiduciary character of the debt and the other was as to the delay in obtaining the discharge. As to the last question, the court said: "By section 5119 of the Revised Statutes, the certificate of discharge was made conclusive evidence in favor of the bankrupt of the fact and regularity of such discharge. We must presume therefore that the application was made within the time required by section 5108, or if not, that any delay there may have been was satisfactorily explained before the discharge was granted. The certificate is conclusive on that question."

It is claimed by the learned counsel of the respondent that the question whether the judgment could be affected by the discharge according to the statute was not raised or discussed in the case in any of the courts. That may be, but that question was directly involved in the case, and it was probably thought useless to question the uniform decisions of the Court of Appeals upon it. If the Supreme Court of the United States entertained any different view of that question from the Court of Appeals, it would have been mentioned, as it would have caused a reversal of the judgment on that ground alone. That court adopted, *sub silentio*, the ruling of the courts of New York upon that question, by affirming the judgment. What was the use of disposing of the question of laches or delay in obtaining the discharge, if the discharge itself could have no such effect under any circumstances? If the counsel of the plaintiff in error in that case had supposed that the Supreme Court would hold differently on that question from the Court of Appeals, that court

would have been asked to reverse the judgment on that ground, because the Federal question also was directly involved in the case, and the effect of the discharge upon the judgment was involved in the question of delay in obtaining it.

In *Braman v. Snider*, 21 Fed. Rep. 871 (in the United States District Court for the district of Minnesota), a case of similar facts, Judge NELSON held that "the doctrine of merger and extinguishment of the debt, and that the judgment constitutes a new debt from the time of its recovery, is not applicable under the Bankrupt Act." A similar decision was made by the United States District Court for the district of Nevada in *Re Stansfield*, 16 N. B. R. 268.

The decisions against this effect of the subsequent discharge to release the intermediate judgment under the law of 1867 have been in part based upon the provision of the law that allows the bankrupt to apply for a continuance of the action until he obtains his discharge. It is said in one of the leading cases supporting this doctrine (in *Bradford v. Rice*, 102 Mass. 472; s. c., 3 Am. Rep. 483) that the same proceeding was taken as a rule of practice under the law of 1841, and that therefore the same doctrine prevailed in many of the States under the law of 1841; and so strongly did this reason prevail in Massachusetts that in *Haggerty v. Amory*, 7 Allen, 458, in an action upon a judgment rendered in the courts of New York after the commencement of proceedings in bankruptcy under the bankrupt law of 1841, it was held that the discharge might be pleaded as a defense, because that rule of practice did not prevail in the courts of New York. This is hardly consistent with the other reason given (which is a mere fiction or technicality) for holding that the judgment is unaffected by the discharge, which is that the debt, which would have otherwise been released by the discharge, is merged or lost in the judgment, and that the judgment constituted a new debt, pending the proceedings in bankruptcy, which could not be so released. If that reason be a good one, then the judgment so rendered in New York is no more released than if it had been rendered in any other State.

The opposite rule is founded on better reasons. They are stated, perhaps, fuller and more satisfactorily in *Dawson v. Hartsfield*, 79 N. C. 334, than in any other case, and they commend themselves to our judgment. (1) The bankrupt law, and the oath required of the creditor to prove his claim, show that it is the debt itself, in whatever form or however evidenced, which is affected by the dis-

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charge. (2) The consideration must be inquired into in order to ascertain whether the debt is provable, or of such a nature as to prevent a discharge as in *Palmer v. Hussey, supra*. (3) The judgment is no more evidence of a new debt, in such a case, than a bond, promissory note, or some other evidence of debt into which the original debt was merged, and no more extinguishes the debt. It is the date of the demand and not the subsequent judgment on it that must determine whether the creditor was an existing one when an assignment or other transfer was made, so as to be allowed to attack it for fraud. (4) It is within the spirit and equity of the law to regard only the debt and not its form. (5) The opposite rule is narrow, technical, and absurd, and would defeat the objects of the law. These reasons are stated at length by great strength of language and by apt illustration.

In *Dresser v. Brooks*, 3 Barb. 429, it is said: "The consequence of adopting the strict and narrow construction of holding a judgment exempt from the operation of a discharge because the debt exists in a different form and under a different name would, in the case of a bankrupt whose debts were numerous, utterly defeat the benign object of the act, and leave the unfortunate bankrupt subject to a great portion of his debts after every dollar of his estate had been faithfully devoted to their payment."

It might be added to these reasons, that if one creditor whose debt was provable under the bankrupt law could bring an action on it and cause it to be so changed by a subsequent judgment upon it as to be exempt from the operation of the discharge, they may all of them take the same course, and none of them be left to give effect to the proceedings or the discharge, and the bankrupt would be defeated in trying to take the benefit of the act. And again if even they might be stayed in these actions upon the application of the bankrupt, he would, pending his bankruptcy, be harassed by a multiplicity of suits, here and everywhere, and suffer great expense in money and hardship and care and labor, and his whole time and attention be employed in seeking to stay the proceedings, a trouble and embarrassment not only not contemplated, but actually prohibited, by the act.

It is well said in Bump's Law and Practice in Bankruptcy (6th ed.), 411: "A debt upon which a judgment has been rendered since the commencement of proceedings in bankruptcy may be proved. The debt is not extinguished. The instrument, contract

or obligation upon which the debt arose is extinguished, but not the debt. The debt remains. If this were not so, the judgment would destroy itself by extinguishing the very foundation on which it is built. The debt was founded on contract; it is now founded on judgment; but it is the same debt. * * * The theory that the debt is so merged as to be extinguished has no applicability under the Bankrupt Act."

I have referred specially to only a few of the decisions of this question cited by the learned counsel on both sides, which however will be preserved in their able briefs. But I think it may be safely said that the decided weight of authority, both in number and reason, is upon the side of the appellant. It being a Federal question arising under a law of Congress, the above decision of it by the Supreme Court and other Federal courts is of the highest authority, if not binding. The intimation of Mr. Justice GRAY, in *Hill v. Harding*, 107 U. S. 631, and the decisions of the Circuit Court for the district of Massachusetts, have clearly been induced by the uniform decisions of the courts of that State. The cases cited from the United States Reports by the learned counsel of the respondents are not applicable.

The question of delay in procuring the discharge can cut no figure in this case. That question was disposed of by the bankrupt court on granting the discharge, which is conclusive evidence that the delay, if any, was sufficiently excused. *Palmer v. Hussey, supra*. In that case there was nearly the same delay in obtaining the discharge as in pressing the judgment. In this case the plaintiff filed his bill and obtained an injunction just as soon as the defendant Yohnk attempted to enforce his judgment by execution, and then obtained his discharge without delay. What was said in *Dawson v. Hartsfield, supra*, is appropriate here: "Eight years have elapsed since the judgment was entered up; and if the defendant has delayed in seeking his release, the plaintiff has also waited, and made no attempt meanwhile to enforce his judgment. Positive action was necessary on the part of the plaintiff, for without it no opportunity was given him. He may have supposed that the plaintiff, by his long acquiescence, was assenting to the efficient operation of the discharge in working out its proper results, and therefore no movement on his part was required. Why should there be needless litigation, and why should the defendant believe the plaintiff ever intended to enforce his debt? His conduct was rec-

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oncilable only with the idea of a silent self-adjustment, without the intervention of pleading and process. But as soon as the plaintiff wakes up and shows his intent to enforce his demand, he puts in operation the very machinery which lets in the defense."

In this case the judgment was rendered in 1870, and the execution was issued in 1886. There are peculiarities in this case that ought to be noticed. The defendant Yohnk filed his claim in the bankrupt court before he obtained judgment upon it. By so doing he is deemed to have waived all right of action against the bankrupt, and was not allowed to maintain any suit upon the claim, by Rev. Stat. U. S., § 5105. See also *White v. Crawford*, 9 Fed. Rep. 371. But not content with this submission to the bankrupt court, Yohnk filed his judgment also, after he had obtained it by default. The learned counsel contends, and cites some authorities to show, that the filing of the judgment was a nullity, and does not estop Yohnk from otherwise enforcing it. It is said by Freeman, in his tract on the Enforcement of Judgments against Bankrupts, that "the authorities preponderate in favor of the position that the taking of the judgment pending proceedings in bankruptcy does not prevent the plaintiff from proving his claim against the bankrupt estate," and the author cites many authorities to that effect. The disagreement is as to whether, in such a case, any of the costs may be included. But the effect of such filing as a waiver of his right to enforce the judgment upon the bankrupt's after-acquired property cannot be reasonably questioned. Such an act, in such a case, seems to me to be of the very essence of an estoppel. The creditor should not be allowed so to play fast and loose between the bankrupt court and the State court, and "blow hot and cold" in the same proceeding. *Allegans contraria non est audiendus*. The creditor in this way influences the action of the bankrupt court, and affects the rights of other creditors as well as of the bankrupt. 1 Freem. Estop. 2. But in the view we have taken of the effect of the judgment, the filing of the judgment was but a re-filing and an insisting upon the same claim in the bankrupt court, and it operates as a concession that it is the same claim or debt, notwithstanding the judgment.

The only remaining material question is one of jurisdiction, whether the plaintiff was not bound to seek his remedy by motion in the same case in which the judgment was rendered; or in other words, whether the plaintiff had not in that way a complete remedy

at law. In the first place, this objection to the action does not go strictly to the jurisdiction of the court. It is a mere rule of practice that courts of equity will not entertain jurisdiction when there is a complete remedy at law. It may be that the same remedy here sought might have been obtained by motion in that case; but the remedy need not be sought by motion, unless the facts appear on the record. If any facts are to be established by extrinsic evidence, then the suit in equity may be maintained. *McIndoe v. Hazellon*, 19 Wis. 567. In this case, the whole matter of the bankruptcy and the discharge are extrinsic of the record. By the authority of that case also, if the plaintiff has shown by his complaint that he will suffer any injustice by the levy of the execution and the sale of his property under it, he is entitled to equitable relief. It was not only proper, but necessary, that the further proceedings under the execution should be enjoined until the discharge in bankruptcy could be obtained, and therefore the complaint was demurrable. It was certainly as proper to file a supplemental complaint on the happening of that event, in order to obtain a perpetual injunction of any proceedings under said judgment or other proper relief against the same. One of the objects of a supplemental bill, or a supplemental amendment of the original bill, is "when new events, referring to and supporting the rights and interests already mentioned, have occurred subsequently to the filing of the original bill." Story Eq. Pl. 336; Mitf. Ch. Pl. 55, 61, 325.

I have given more space to this opinion, because the main questions are in conflict in other courts, and new in this court, and very important.

By the COURT.—The order denying the motion to set aside and vacate the order sustaining the demurrer to the complaint, and the order denying the motion to set aside and vacate the order denying the plaintiff leave to serve the supplemental complaint, are both reversed, and the cause remanded for further proceedings according to this opinion.

Orders reversed and cause remanded.

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ACCOUNT STATED.

Between partners.] A statement of partnership accounts, prepared by clerks to aid in a settlement between the partners, is *prima facie* evidence, binding as to items mutually assented to at the time, but not as to disputed items. *Rehill v. McTagus* (114 Penn. St. 83), 841.

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2. Liability for injury by — viciousness.] One may recover for an injury by the bite of a dog upon showing the owner's knowledge of his propensity to bite, whether in anger or not. *Evans v. McDermott* (49 N. J. Law, 168), 603.

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2. **New promise.]** A debt discharged in bankruptcy may be revived by a promise to pay it, made between the adjudication and the discharge. *Griel v. Solomon* (82 Ala. 85), 788.
3. **—.]** A debt discharged in bankruptcy is not revived by a new promise that "no matter what might happen to him, he would never let plaintiff lose any thing by him." *Id.*

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See CRIMINAL LAW, 876.

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1. Agent — bill of lading — goods not received.] A carrier having authorized an agent to issue bills of lading in its name on receipt of property for transportation, is liable upon a bill of lading issued by such agent, and transferred by the shipper to one who on the faith of it has discounted a draft on the consignee, although no property was received by the carrier. *Bank of Batavia v. New York, Lake Erie & Western R. Co.* (106 N. Y. 195), 440.
2. — contract — at station — apparent authority.] The plaintiff, applying to the defendant's station agent at O. for cars to ship hogs, was referred by him to the defendant's station agent at L., on another branch of the road, and the latter agent undertook to have the cars at O. the next day. They were however delayed two days. It was shown that the agent at L. had no actual authority to contract for cars at O. *Held*, that he had no apparent authority to do so, and plaintiff could not recover for the delay. *Voorhees v. Chicago, Rock Island & Pacific Ry. Co.* (71 Iowa, 785), 823.
3. Express company — presumption of negligence.] If an express company loses goods in course of transportation, negligence is presumed. *Grogan v. Adams Express Co.* (114 Penn. St. 523), 360.
4. — Limitation of Liability.] An express company may not limit its liability for loss of goods by its own negligence. *Id.*
5. Railroad conductor taking fare beyond authority — ejection of passenger.] The plaintiff took passage on defendant's railroad, asked the conductor the fare to his destination, which as the plaintiff knew was a short distance off the defendant's line, was informed of the amount, and paid it to the conductor, receiving a check. At W., the end of the defendant's road, he changed cars, giving up his check, and that car was switched off on another road. The conductor had really charged and taken fare only to W., and had no authority to take fare beyond. The new conductor on the second road demanded the additional fare, which the plaintiff refused to pay, and he was ordered off, and left the train without force or indignity on the part of the trainmen. *Held*, that he could not recover. *Haggerty v. Flint & Pere Marquette R. Co.* (59 Mich. 366), 301.

See MASTER AND SERVANT, 873.

CHARITY.

See WILL, 226.

COMPROMISE.

1. Consideration — withdrawing opposition to will] Where a beneficiary under a will had filed a *caseat* against the probate, and in consideration of his withdrawing opposition and assigning his interest in the testator's estate beyond the provision for his benefit in the will, the residuary lega-

COMPROMISE — *Continued.*

tee agreed to pay him \$800 and assign him certain stock, and paid the money but refused to assign the stock, *held*, that in an action for the breach the plaintiff need not aver that his interest under the will was not equal to his share of the estate as heir and next of kin. *Grandin v. Grandin* (49 N. J. Law, 508), 642.

2. Rescission for fraud — undue influence.] The complainant, a young man of dissipated habits and addicted to intoxication, was induced by the defendant, a mature and experienced man, to become his guest at a hotel where he and his family resided, at a distance from his own friends and relations, and there, while drinking to excess, he was privately induced by the defendant to assent to a compromise of his claims worth \$5,000 for some \$1,500. *Held*, that the compromise should be set aside. *Cleere v. Cleere* (89 Ala. 581), 750.

CONDITION SUBSEQUENT.

See DEED, 449.

CONSPIRACY.

To assault—homicide by one.] *See* CRIMINAL LAW, 122.

CONSTITUTIONAL LAW.

1. Eminent domain — injuring property — change of grade of sidewalk.] The Constitution requires corporations, authorized to take private property for public use, to "make just compensation for property taken, injured or destroyed by the construction or enlargement of its works, highways or improvements." In an action against a city for injury to adjoining property by cutting down a sidewalk, *held*, that an instruction that the plaintiff was entitled to recover if his property was injured was error, because his right depended on whether the effect of the alteration was or was not reasonably within the purview of the original taking or dedication. *City Council of Montgomery v. Townsend* (80 Ala. 489), 112.
2. Furnishing adulterated milk to cheese factory.] A statute making it a misdemeanor to sell or bring adulterated or diluted milk to a butter or cheese factory to be manufactured, is valid. *People v. West* (106 N. Y. 208), 452.
3. License of railroad engineers.] A statute requiring railroad engineers to be examined and licensed by a board appointed by the governor, and making it a misdemeanor for any one to operate an engine without being thus licensed, is constitutional. *McDonald v. State* (81 Ala. 279), 158.
4. Oleomargarine.] *Powell v. Commonwealth* (114 Penn. St. 265), 350.
5. Production of witness convicted of felony.] A statute prohibiting the production on *habeas corpus*, as a witness, of any person imprisoned under sentence for felony is constitutional, although such person may be a competent witness. *Ex parte Marmaduke* (91 Mo. 238), 350.
6. Prohibiting refreshment-stands near camp-meetings.] A statute making it penal for any one, without the permission of those in charge of a camp-meeting, to establish any tent, booth or place for vending provisions or

CONSTITUTIONAL LAW — *Continued.*

refreshments within one mile of such meeting, with a proviso that any one who has his regular place of business within such limits shall not be required to suspend his business, is not invalid. *Meyers v. Baker* (120 Ill. 587), 580.

7. **Taxation of legacies.]** The legislature has no power to tax legacies and successions. *Curry v. Spencer* (61 N. H. 624), 887.
8. — **of gross receipts of telegraph companies.]** The Constitution provides that all taxes shall be assessed in exact proportion to the value of the property, and shall not exceed one per cent of such value. A statute provides for a tax of two per cent on the gross amount of receipts of telegraph companies. *Held*, not an infringement of the said constitutional provision, nor of that of the Federal Constitution as to inter-State commerce. *Western Union Tel. Co. v. State Board of Assessment* (80 Ala. 278), 99.

CONTEMPT.

Libel of grand jury.] The defendant had been tried on an indictment and the jury had disagreed. He thereupon published in his newspaper an article intending to cast discredit on the grand jury which indicted him, the sheriff who summoned it, and the judge who presided, and would preside on a second trial. *Held*, a contempt. *In re Cheeseman* (49 N. J. Law, 187), 596.

CONTRACT.

1. **By letter.** Where by agreement an insurance is to attach from the time of a deposit of a letter in the post-office, this implies a letter duly stamped. *Blake v. Hamburg-Bremen Fire Ins. Co.* (67 Tex. 160), 15.
2. **Illegal — loan for gambling.]** To invalidate a loan for a gambling transaction, the lender must not only have known the use intended, but must have been implicated as a confederate, though not necessarily for gain. *Waugh v. Beck* (114 Penn. St. 422), 854.
3. **Restraint of trade.]** An agreement to relinquish a business and not carry it on thereafter, "in the vicinity of Marlborough," is not invalid, although unlimited as to time. *Webster v. Buss* (61 N. H. 40), 817.
4. — **]** An agreement, upon the sale of a stock of goods and the good-will of a business, not to re-engage in that business in the same village for five years, is valid. *Washburn v. Dosch* (68 Wis. 486), 878.
5. — **general restraint.]** The defendant sold his match manufacturing business, with the good-will, to a corporation, then engaged in the same business, and covenanted with the purchaser and its assigns not to engage within ninety-nine years in the like business, except for the purchaser, in any of the United States or territories except Nevada and Montana. *Held*, (1) valid; (2) that an injunction should be awarded, although the defendant, in connection with the covenant, had also executed a bond for liquidated damages; (3) and that the plaintiff, a foreign corporation and assignee of said purchaser, could enforce the agreement. *Diamond Match Company v. Roeder* (106 N. Y. 473), 464.

CONTRACT — *Continued.*

6. To provide for adopted child by will.] An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property upon their death. *Sharkey v. McDermott* (91 Mo. 647), 370.
7. To repair building — destruction by fire.] Under a contract to furnish materials and perform labor in altering an existing structure, according to agreed specifications, with no provision as to time of payment, if the structure is destroyed by fire, without the fault of either party, when the work has been only partly performed, the builder may recover *quantum meruit*. *Weis v. Devlin* (67 Tex. 507), 88.

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE.

CORPORATION.

1. *Gratuitous stock — liability of holder to creditor.*] A corporation transferred shares of its stock and its bonds to the defendant gratuitously. The defendant sold the bonds. None of the property of the corporation had been applied in payment of the bonds. *Held*, that a creditor of the corporation could not compel the defendant to pay for the stock or account for the bonds. *Christensen v. Eno* (106 N. Y. 97), 499.
2. *Notice of equities — notice to agent.*] Where an agent or officer of a private corporation sells and conveys land to it, his knowledge of an outstanding equity does not charge the corporation. *Fronkel v. Hudson* (82 Ala. 158), 786.
3. *Several liability of stockholders.*] Where the charter of a corporation provides that "each stockholder shall be jointly and severally liable to the creditors thereof in an amount, besides the value of his share or shares therein, not exceeding ten per cent of the par value of the share or shares held by him," a creditor may bring his individual action at law against one of the stockholders, to recover his debt to the extent of ten per cent of the par value of the defendant's shares. *Hall v. Kinck* (25 S. C. 348), 505.
4. —.] Under a bank charter providing that stockholders "shall be individually liable to the amount of their stock for all the debts of the corporation," *held*, (1) that the liability reaches to the nominal value of the stock, and not merely to the unpaid balance on stock subscriptions; (2) that the stockholder is liable, although he was not a stockholder when the creditor's cause of action accrued. *Root v. Sincock* (120 Ill. 350), 558.
5. *Transfer of stock — attachment.*] Where corporate stock is assigned, without the entry of the transfer on the books of the corporation, as required by statute, it is invalid as against attaching creditors of the assignor without notice. *Fort Madison Lumber Co. v. Balaban Bank* (71 Iowa, 270), 789.

CORPORATION — *Continued.*

6. **Wrongful acts of officers — action by stockholders.]** Stockholders of a corporation cannot maintain an action accruing to the corporation for breach of contract, and which its officers and directors refuse to bring. *Slattery v. St. Louis & New Orleans Trans. Co.* (91 Mo. 217), 245.

CRIMINAL LAW.

1. **Burglary — constructive breaking.]** The defendant, with intent to rob an express car, secreted himself in a box which he procured to be placed in the car by the agents of the express company. *Held*, a constructive breaking. *Nicholls v. State* (68 Wis. 416), 870.
2. **Conspiracy to assault — homicide by one.]** If several persons conspire to invade a man's household, and go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of this common design one of them gets into a difficulty with him, and kills him, the others being present, or near at hand, the latter are guilty of murder although they did not intend to kill. *Williams v. State* (81 Ala. 1), 138.
3. **Embezzlement — of firm moneys by partner.]** A member of a firm may not be indicted for embezzling the partnership funds. *State v. Butman* (61 N. H. 511), 832.
4. **Evidence of good character.]** In criminal trials evidence of good character is always to be considered, and its application is not to be limited to doubtful cases. *State v. Barth* (25 S. C. 175), 496.
5. **False pretenses — as to financial condition of bank.]** A false and fraudulent statement, by the president of a bank, that the bank is perfectly solvent, and that its assets are largely in excess of its debts and liabilities, constitutes false pretenses. *Commonwealth v. Wallace* (114 Penn. St. 405), 353.
6. **Former conviction fraudulently procured — trial of general issue.]** A defendant pleaded not guilty and former conviction. It being shown that the former conviction was procured by his fraud and collusion, *held*, (1) that it was void; (2) that there must be a trial on the general issue. *McFarland v. State* (68 Wis. 400), 867.
7. **Homicide — deceased's neglect of wound.]** On a trial for murder, the court charged that if death ensues from a wound inflicted in malice, but not in its nature mortal, but which is neglected or mismanaged, the defendant must be held guilty, unless it clearly appears that the neglect and mismanagement were the sole cause of the death. *Orum v. State* (64 Miss. 1), 44.
8. **— insanity — proper rule of responsibility.]** One who by reason of mental disease has lost the power of will to control his actions and choose between right and wrong, is not responsible to the criminal law for an act which is solely the product of such disease, although he may know right from wrong. *Parsons v. State* (81 Ala. 577), 193.
9. **—.]** The existence or non-existence of the disease of insanity, such as may fall within the above rule, is a question of fact to be determined in each particular case by the jury, enlightened, if necessary, by the testimony of experts. *Id.*

CRIMINAL LAW — *Continued.*

10. **Homicide — insanity — proper rule of responsibility.**] When insanity is set up as a defense in a criminal case, it must be established to the satisfaction of the jury by a preponderance of the evidence, and a reasonable doubt of the defendant's sanity, raised by all the evidence, does not justify an acquittal. *Id.*
11. — **res gestæ — declarations of deceased.**] A., having been fatally assaulted, ran about a hundred yards, and on a third party's coming up about five minutes after the assault, told him the name of his assailant. *Held*, that this declaration was inadmissible as part of the *res gestæ*. *Mayes v. State* (64 Miss. 329), 58.
12. **"Intoxicating liquor" — beer.**] Beer is not necessarily an "intoxicating liquor." *Hansberg v. People* (120 Ill. 71), 549.
13. **Larceny — lucti causa — asportation.**] The prisoner went secretly and unlawfully to the stable of another, led therefrom a jack belonging to the latter, and when fifteen or twenty feet from the door of the stable, killed the jack and left it lying on the owner's premises. *Held*, larceny. *Delt v. State* (68 Miss. 77), 48.
14. **Nuisance — legislative authority.**] A board of health, empowered by the legislature to regulate and control or prohibit the carrying on of offensive manufactures attended by noisome or injurious odors, has no authority to license the manufacture of fertilizers in such a way as to create a public nuisance. *Garrett v. State* (49 N. J. Law, 94), 592.
15. — **neglecting to keep highway in repair.**] A turnpike company may be indicted for failure to maintain its road in repair prescribed by the charter, but not for failure to construct the road in the prescribed manner. *State v. Godwinsville & Paterson Macadamised Road Co.* (49 N. J. Law, 266), 611.
16. **Ordinance — visiting disorderly house.**] A city ordinance which provides that "any person who shall be found in or frequenting any disorderly house shall be subject to a fine," is not void because it fails to use the word "unlawfully." *State v. Botkin* (71 Iowa, 87), 780.
17. **Statute — abusive language near dwelling-house — construction.**] Under a statute punishing any one who enters into or sufficiently near the dwelling-house of another, and in the presence or within the hearing of the family or any member of it, or of any female, uses abusive, insulting or obscene language, a conviction may be had although the offender was on his own adjacent premises, and used the words in ordinary conversation with his visitors without any intention to have them overheard by others. *Mullens v. State* (82 Ala. 42), 731.
18. **Venue — prisoner's right to change of.**] At common law the venue in a criminal case may be changed on application of the prisoner. *State v. Albee* (61 N. H. 423), 325.

DAMAGES.

1. **Elevated railway.**] In an action against an elevated street railway by an adjacent lot-owner for damages by occupation of the street, evidence is competent to show that since the building of the railroad the trade and

DAMAGES — *Continued.*

- business of the street has diminished and changed. *Drucke v. Manhattan R. Co.* (106 N. Y. 157), 487.
2. **Diminution of business.]** It appeared that the result was partly due to a tendency in business to move "up town." *Held*, that it was for a jury to estimate the proportion of loss chargeable to the defendant, and that a recovery for such estimated loss was proper. *Id.*
3. **Measure — contingent profits.]** In an action for breach of contract to construct a levee, for the purpose of reclaiming swamp land, the loss of possible profits under a lease of the land executed by the plaintiff, without the defendant's knowledge, after the breach of the contract, is not a proper item of damage. *Wallace v. Ah Sam* (71 Cal. 197), 534.
4. **— landlord and tenant — breach of covenant for quiet enjoyment.]** *Peposkey v. Munkwitz* (68 Wis. 823), 858.
5. **Profits.]** In an action for damages for failure to repair an implement, the loss of profits is not a proper element of damages unless the defendant knew the circumstances and contracted with reference to them. *Sutton v. Macdonald* (25 S. C. 68), 484.
6. **Remote.]** In an action of damages for breach of contract to pay to a creditor of the plaintiff money intrusted to the defendant by the plaintiff therefor, evidence is not admissible to show that the creditor sued the plaintiff therefor, and attached his property and sacrificed it as perishable, unless the defendant had knowledge of special circumstances showing that he contracted with reference to such an emergency. *Mitchell v. Clarke* (71 Cal. 163), 529.
7. **Speculative — profits of business.]** Where the business of a manufacturer was wrongfully stopped by the defendant, and at the time of such stoppage the plaintiff had contracts which would have yielded a profit, *held*, that this profit was the proper measure of damages, and that the estimated profits of the general business were too speculative and remote. *Jones v. Call* (96 N. C. 337), 416.

See NEW TRIAL, 265.

DEED.

1. **Consideration — agreement to pay more — agency.]** An agent authorized to buy land for a consideration paid the sum mentioned in the deed, but orally agreed to pay more in the future. The corporation accepting the deed, *held*, liable for the additional consideration. *Kickland v. Menasha Wooden Ware Co.* (68 Wis. 84), 831.
2. **Delivery.]** A father, about a year before his death, executed and acknowledged a deed to his son, and caused to be drawn up a note for \$100 payable to his daughter, which was folded in the deed and both papers were locked up by the father in his bureau drawer, the key to which he kept in his pocket-book on his person till his death. He directed the daughter to open the drawer, at his death, and on the execution of the note by her brother, to deliver to him the deed, which was done. He also joined with his wife in deeds to two sons severally and deposited them with a third

DEED — *Continued.*

party, together with a note for \$1,000 payable to the daughter, with oral instructions to keep the papers until the father's death, when on the brothers' signing the note the deeds were to be delivered. At this time the father was sick and gave the custodian of the papers to understand that he did not expect to recover. After his death the sons signed the notes and the deeds were delivered to them. The father had always asserted his intention to retain control of all of his property until his death, and that unless the notes were signed the grantees should take nothing under the deeds. *Held*, no delivery. *Taft v. Taft* (59 Mich. 185), 291.

3. For highway — condition subsequent.] A warranty deed for value conveyed a strip of land to a town, and its "assignees forever," with the following clause succeeding the description: "To be used as a highway, with all the privileges thereunto belonging for such purpose only, with the appurtenances and all the estate, title and interest of the parties of the first part therein." *Held*, that the fee passed. *Vail v. Long Island R. Co.* (106 N. Y. 288), 449.

DEVISE.

See WILL.

DOWER.

See MARRIAGE, 552, 776.

EMBEZZLEMENT.

See CRIMINAL LAW, 332; LIBEL AND SLANDER, 262.

EMINENT DOMAIN.

See CONSTITUTIONAL LAW, 112.

ESTOPPEL.

By oral admission.] Where plaintiff sues for timber cut and carried away by defendant, an oral admission by defendant that the timber was cut from plaintiff's land, whereby plaintiff was induced to bring the action, does not estop defendant from denying the truth of the matter admitted. *Sullivan v. Conway* (81 Ala. 158), 142.

Of married woman.] *See* MARRIAGE, 401, 701; SALE, 140.

See EVIDENCE, 404.

EVIDENCE.

1. *Account-books — account against executor — plaintiff as witness.*] A statute prohibiting a party to an action against an executor or administrator from being a witness as to any fact occurring before the death of the deceased, does not prevent the plaintiff in such an action from testifying to the correctness of books of account which had been wholly kept by him, preparatory to their introduction in evidence, and such books cannot be proved by a third person who had no personal knowledge of their correctness. *Becke v. Ware* (71 Cal. 376), 590.

EVIDENCE — *Continued.*

2. As to boundaries — reputation.] Declarations as to boundaries, by a deceased person who was never the owner of the premises, and not made in the performance of any act in respect to such boundaries, are inadmissible in evidence. *Curtis v. Aaronson* (49 N. J. Law, 68), 584.
 3. Handwriting — cross-examination — comparison.] On the issue as to the genuineness of a signature, it is not competent, on cross-examination, to submit to the witness simulated signatures and require his opinion as to their genuineness. *Ross v. First National Bank of Springfield* (91 Mo. 399), 258.
 4. Statement — in presence of party — estoppel.] Where a witness was examined in a suit in which the defendant in the present action was a party and also a witness, and on such examination made statements in the presence of the defendant derogatory to his rights in this action, which were not then denied, or contradicted on the defendant's examination in that action, *held*, that the defendant was not estopped by such statements, and they were not evidence in this action. *Blackwell Durham Tobacco Co. v. McElwee* (96 N. C. 71), 404.
- Of custom.] See AGENCY, 876.
- Of good character.] See CRIMINAL LAW, 496.

EXECUTION.

Exemption — "tools" — printing-press.] A printing-press is not a "tool" exempt from execution. *Frants v. Dobson* (64 Miss. 631), 68.

EXECUTOR AND ADMINISTRATOR.

Foreign will — action for legacy.] Where a testator domiciled in England bequeathed a legacy to a resident of this State, and the executor qualified in England and this State, and paid all debts and all other legacies, and there were sufficient assets in this State to pay this legacy, *held*, that the legatee might maintain an action in this State against the executor to recover the same. *Graveley v. Graveley* (25 S. C. 1), 478.

EXEMPTION.

See EXECUTION, 68.

EXPRESS COMPANY.

See CARRIER, 360.

FALSE IMPRISONMENT.

Arrest without warrant.] An officer has no right to arrest without a warrant, after an offense has been committed, where the punishment is only fine and imprisonment in jail. *Bright v. Patton* (5 Mack. 534), 396.

FALSE PRETENSES.

See CRIMINAL LAW, 356; SCHOOLS, 709.

FIXTURES.

1. **Machinery — test of annexation.]** The mere use of machinery in a mill does not render it a fixture, but the question always depends on the use, nature and character of the annexation, and on the intention of the parties. *Rogers v. Prattville Manufacturing Co.* (81 Ala. 483), 171.
2. **Trade — mortgagor.]** Where the mortgagor of a foundry and machine shop puts in new machinery, such as vises, lathes, pulleys, belts, shafting, etc., intended by him "to be used permanently with the foundry property, and to enhance its value," he may not remove them on foreclosure. *Foots v. Gooch* (96 N. C. 265), 411.

FRAUD.

1. **Constructive — father and adult daughter — third person with notice.]** Business transactions between a father and his unmarried daughter, who is of age, but who continues to reside with him as a member of his family, by which she assumes a pecuniary obligation for his benefit, are regarded in equity as transactions between persons occupying a fiduciary relation toward each other, and will not be sustained or enforced, unless the presumption of undue influence is rebutted, and it is shown that the daughter acted with full knowledge of the facts and had independent legal advice; and the person who advances money to the father on the credit of the daughter, under such circumstances, having knowledge of the facts, occupies no better position than the father. *Noble's Administrator v. Moses* (81 Ala. 580), 175.
2. **Fraudulent representations by agent — liability without benefit.]** One purchasing cattle through an agent, intrusted him with his check signed in blank, and the agent filled the blank, and induced the seller to accept it in payment by the false and fraudulent representation that the check was good, the seller knowing nothing of the purchaser's financial ability or of the value of the check. The check proving worthless, *held*, that the agent was liable to the seller in damages, although he derived no benefit from the deceit and did not collude with the purchaser. *Endsley v. Johns* (120 Ill. 469), 572.

See COMPROMISE, 750; SALE, 140.

GAMING.

See CONTRACT, 354.

GIFT.

- Inter vivos — trust — bank deposit.]** Where one deposits money in a bank in another's name, but subject to his own order, and without notice to the other, and retains the pass-book and control of the fund, this is not a gift *inter vivos* nor a trust. *Marcy v. Amaseen* (61 N. H. 181), 330.

HIGHWAY.

See DIED, 449.

HOMESTEAD.

1. "Alienation"—will.] A provision by will that the testator's property, consisting exclusively of personalty, should be sold and applied to the payment of his debts, is not such an "alienation" as will defeat the widow's claim to an exemption under the homestead laws. *Hendrie v. Seaborn* (25 S. C. 481), 520.
2. Tax collector's—liability on his bond.] The homestead of a tax collector is subject to the lien of his official bond, in the hands of a purchaser with notice before judgment. *Schuessler v. Dudley* (80 Ala. 547), 124.

HOMICIDE.

See CRIMINAL LAW, 44, 58, 193.

INFANCY.

See NEGLIGENCE.

INSANITY.

See CRIMINAL LAW, 193.

INSURANCE.

1. Condition against incumbrance—violation.] A condition in a fire insurance policy, issued to a firm, that the property should not afterward be in any manner incumbered, held, violated by the execution of a mortgage by one of the partners on his undivided interest in the property, and by a judgment against him which became a lien on his interest. *Hicks v. Farmers' Ins. Co.* (71 Iowa, 119), 781.
2. Contract for building—insurable interest—assignment.] When a builder contracts to furnish materials and build a house for another person, at a stipulated price, payable in installments as the work progresses, and takes out a policy of insurance on the house during its construction, and it is destroyed by fire before completion, the loss is his, although he may have received partial payment by installments; and having assigned the policy to the person for whom the house was built, the latter may maintain an action on it, or may assign it to another person with whom he had effected insurance on the house. *Commercial Fire Ins. Co. v. Capital City Ins. Co.* (81 Ala. 820), 163.
3. Forfeiture for sale—executory.] A fire insurance policy, conditioned to be void upon a sale of the premises, is avoided by a contract of sale under which the purchaser takes possession, although it provides that it may be forfeited by non-payment of the deferred payments, and although it has been abandoned. *Davidson v. Hawkeye Ins. Co.* (71 Iowa, 539), 818.
4. Incontestable save for fraud—estoppel to deny receipt of premium.] A policy of life insurance provided that it should be incontestable except for fraud, and expressly admitted the payment of the premium. The premium was not paid, but the insured gave orders therefor on his employer, who at his request refused to pay them. The orders stipulated that if they were not paid the insured's rights should be forfeited. Held, that as against the beneficiary the company was estopped to deny the payment of the premium. *Kline v. National Benefit Association*. (111 Ind. 462), 703.

INSURANCE — *Continued.*

5. **Indivisible risk.**] Where a building and the furniture in it were insured by one policy for one gross premium, although in separate amounts, the contract must be treated as entire; and is wholly avoided by a breach as to either part. *Havens v. Home Ins. Co.* (111 Ind. 90), 689.
6. **Interest — assignment by insured to one without interest.**] *Bloomington Mutual Benefit Association v. Blue* (120 Ill. 121), 558.
7. **Life — assignment — interest.**] *Murphy v. Red* (84 Miss. 614), 68.
8. **Of royalties — validity — interest.**] Defendant executed an insurance policy to plaintiff, reciting that E. & Co., "by virtue of an agreement with the assured, are bound to pay them royalties for the privilege of using their patents, which royalties are guaranteed to amount to \$250 a month," and covenanting that in case the premises of E. & Co. should be damaged by fire, "so as to cause a diminution of said royalties," defendant would pay the amount of such diminution, during the restoration of said premises to their producing capacity "immediately preceding said fire." The license from the plaintiff to E. & Co. was exclusive. *Held*, (1) that the insurance was not limited to the guaranteed amount of royalties, and was valid; (2) that the recovery should not be limited to loss of royalties on oil actually burned, and that evidence was competent to show the amount of royalties paid for two months, immediately before the fire, during the restoration of the works, and for some months next succeeding. *National Filtering Oil Co. v. Citizens' Ins. Co. of Missouri* (106 N. Y. 535), 473.
9. **Revival — warranty.**] Where a revival of a forfeited life insurance policy is assented to, the original contract is reinstated with all its terms and the new terms expressed in the application for revival. *Metropolitan Life Ins. Co. v. McTague* (49 N. J. Law, 597), 661.
10. **"Disease."**] A cold is not a "disease," but a representation that the insured had not consulted or been prescribed for by a physician is falsified by proof of a consultation or prescription for a cold. *Id.*
11. **Stipulation against other insurance — waiver.**] A policy of fire insurance stipulated that "if the assured shall have or shall hereafter make any other insurance on the property insured, or any part thereof, without the consent of the company hereon written, this policy shall be void." After the policy was executed an agreement was made that other insurance might be taken, and that a written stipulation to that effect would be inserted in the policy. Other valid insurance was taken, but without any notice to the company or request to insert the stipulation agreed upon. *Held*, that the policy was avoided. *Havens v. Home Ins. Co.* (111 Ind. 90), 689.
12. **To creditor — interest.**] A debtor owing \$600 had his life insured for the benefit of his creditor in the sum of \$3,000, the creditor paying all the expenses, premiums and assessments. It was agreed that if the debtor paid the debt and the expense of the insurance, the policy should be made over to him. He died in about two years, without having paid any thing. The creditor received the amount of the insurance. *Held*, that the debtor's administrator could not recover the surplus from him. *Asstet v. Butler* (111 Ind. 579), 723.

INSURANCE — *Continued.*

13. **Waiver of forfeiture by demand of payment.]** A policy of insurance, forfeited by non-payment of premium, is not reinstated by mere demand of payment of the premium. *Cohen v. Continental Fire Ins. Co.* (67 Tex. 325), 24.
14. **Warranty — representation.]** In a policy of fire insurance, printed on a separate piece of paper, and attached by mudlage in a blank between sentences with which it had no proper connection, the following clause was inserted: "Three-fourths loss and iron safe clause. It is agreed and understood to be a condition of this insurance that the assured shall keep a set of books, showing a record of his or their business warranted to be kept in an iron safe at night," etc. The insured did not know of this clause. *Held*, not a warranty. *Goddard v. East Texas Fire Ins. Co.* (67 Tex. 69), 1.
15. — **when construed as representation.]** *Alabama Gold Life Ins. Co. v. Johnston* (80 Ala. 467), 112.

JUDGMENT.

See SET-OFF, 815.

JURY.

- Separation.]** On a murder trial, after the case was submitted to the jury, members of the jury were permitted to go to a privy seventy-five yards distant, unattended by an officer. It was not shown that any one did or could communicate with them. *Held*, no error. *State v. State* (64 Miss. 644), 70.

See NEW TRIAL, 678.

LANDLORD AND TENANT.

1. **Agreement to fix rent by referees — when not arbitration.]** A lease provided that from a certain day the rent should be agreed upon by three disinterested persons to be chosen one by the lessor, one by the lessees, and the third by the two thus chosen. This was done, but only two of the referees were able to agree. *Held*, (1) that this was not an arbitration; (2) that the decision of the two referees was not valid; (3) that the lessor might recover a reasonable rent for the period in question, payable presumably at like times and in like manner as provided in the lease for the first part of the term. *Stoss v. Heissler* (120 Ill. 433), 563.
2. **Liability to rebuild in case of fire — covenant.]** A lessor covenanted to make all necessary repairs upon the outside of the buildings upon the demised premises upon notice to him, and the lessee covenanted to make all necessary inside repairs, and to leave the premises in as good condition at the end of the term, unavoidable casualties excepted. There were mutual covenants that if the buildings should be destroyed or made untenable by fire, either party might terminate the lease upon notice to the other. The buildings were destroyed by fire during the term, and the lessee made demand upon the lessor to rebuild them, and he neglected to rebuild in a reasonable time, neither party giving notice to terminate the

LANDLORD AND TENANT — *Continued.*

lease. *Held*, that the lessor was liable for the damages in an action of covenant broken. *Crocker v. Hill* (61 N. H. 845), 322.

3. Liability of landlord for negligence of janitor — overflow of water.]

The landlord of a building is liable for injury to the goods of a sub-tenant by water which that janitor in the employ of the landlord negligently permitted to escape from a wash-basin in the building. *Pike v. Britten* (71 Cal. 159), 537.

4. Surrender during term — suit for breach of covenant to leave in repair.]

A lease for one year contained a covenant that the tenant would deliver possession of the premises on the expiration of the lease in as good repair as they were at the commencement thereof. There was a surrender of the lease before the end of the year, and in an action for breach of that covenant, *held*, that the tenant was not relieved from the performance thereof by the surrender before the end of the year. *Snowhill v. Reed* (49 N. J. Law, 292), 615.

5. Tenant's negligence — fire.] A tenant maintained a fire in a leased barn, in a stove, the pipe passing through a hole in the roof, by means whereof the barn was destroyed by fire. *Held*, that a finding that the destruction was by the tenant's fault would not be set aside. *Dorr v. Harkness* (49 N. J. Law, 571), 656.

LARCENY.

See CRIMINAL LAW.

LEGACY.

Action for.] *See* EXECUTOR AND ADMINISTRATOR.

See WILL.

LIBEL AND SLANDER.

1. Newspaper — candidate for office.] A publication in a newspaper, falsely imputing a crime to a candidate for public office, is actionable. The defendant's honest belief of its truth may mitigate damages. *Bronson v. Bruce* (59 Mich. 467), 307.

2. Opinions as to meaning of words.] It is not competent, in an action of libel, to aid an innuendo by mere opinions of witnesses. *Pittsburgh, Allegheny & Manchester Passenger Ry. Co. v. McCurdy* (114 Penn. St. 564), 363.

3. Charge of embezzlement.] A publication by a passenger railway company that a conductor was discharged for "failing to ring up all fares collected," does not necessarily import a charge of embezzlement. *Id.*

4. Privileged communication — mercantile agency report.] The publication, by a mercantile agency, of a notification sheet, which is sent to its subscribers irrespective of their interest in the plaintiff's standing and credit, is not a privileged communication, and the proprietors are liable for a false report of the plaintiff's financial condition in such publication. *King v. Patterson* (49 N. J. Law, 417), 622.

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LIBEL.

[Of grand jury.] See CONTEMPT, 506.

LICENSE.

See MUNICIPAL CORPORATION, 619.

LUNATIC.

[Liability of committee for his services.] A committee of a lunatic is bound to account for the value of services rendered by his ward to him, unless the service is required only for proper discipline and for health. *Ashley v. Holman* (25 S. C. 394), 512.

MALICIOUS PROSECUTION.

[Liability of attorney.] To render an attorney liable for a malicious prosecution by his client, it must not only appear that he knew that the prosecution was malicious, but that he knew it was without cause. *Peck v. Chouteau* (91 Mo. 140), 286.

MARRIAGE.

1. **Ante-nuptial agreement to release dower — statute of frauds — ratification.]** An oral ante-nuptial agreement by a woman to renounce all interest in her intended husband's estate after his death is void under the statute of frauds, and is not made valid by the subsequent marriage, nor by her executing, after marriage, a written agreement to that effect, purporting to have been executed before marriage. *McAnnulty v. McAnnulty* (120 Ill. 26), 552.
2. **— separate estate — oral ante-nuptial agreement.]** An oral antenuptial agreement that the husband shall not interfere with the business carried on by the wife, and shall not receive any of the profits accruing from it, unless reduced to writing, is void under the statute of frauds, so far as it was made in consideration of the intended marriage, and will not support a post-nuptial settlement founded on it. *Carter v. Smith* (82 Ala. 834), 738.
3. **Breach of promise — rescission.]** In an action for breach of promise of marriage, the breach being proved, it is no defense that the plaintiff subsequently gave up her engagement ring to the defendant. *Kraabberger v. Roiter* (91 Mo. 404), 262.
4. **Contract for benefit of wife's estate — partnership.]** Where a wife authorizes her husband to contract concerning and for the benefit of her separate estate, and in so doing to use the name of a firm ostensibly composed of her husband and herself she is liable upon an obligation executed by him in that form for that purpose. *Noel v. Kinney* (106 N. Y. 74), 428.
5. **Conveyance in trust for married women and children — when her interest not liable for her debts.]** Under a conveyance of three hundred and eighty-five acres of land, worth about \$2,400, in trust for the use and benefit of a married woman and her children, the trustee being directed to permit the husband to use the lands for the use and benefit of his wife

MARRIAGE — *Continued.*

and children, for their support and the education of the children, and upon the further trust, that upon his death the said lands are to be equally owned and divided by and between all the children then living, "and if the wife shall survive him, then she is to take a child's part of said land for her life only," *held*, construing the deed in connection with the value of the property, the condition, number and relationship of the beneficiaries (including after-born children) to the grantor, that he intended the property should be jointly used and enjoyed by the wife and children as a family, and that her interest in it could not be separated and subjected, by bill in equity, to the payment of her debts. *Bell v. Watkins* (83 Ala. 512), 756.

6. Dower — in partnership land.] Under a contract of partnership in land, providing for the purchase and sale of the land by a trustee, and for conversion of the land into cash before a settlement of partnership dealings, and not for a division of the land, *held*, that the wife of one of the partners got no dower right. *Mallory v. Russell* (71 Iowa, 63), 776.

7. Estoppel of married woman.] Where a wife joined with her husband in a bond to convey land, and after her husband's death received payment and invested the money in other land, she is estopped from claiming dower on the ground that she was not privily examined. *Hodges v. Powell* (96 N. C. 64), 401.

8. —.] Although a wife's separate estate is not ordinarily bound by her engagement as surety, yet it is bound if at the time of contracting, she represents that the engagement is for her own benefit. *Rogers v. Union Central Ins. Co.* (111 Ind. 343), 701.

9. Revocation of will by.] Under a statute that "marriage shall be deemed a revocation of a prior will," such a will is absolutely revoked as to all persons by marriage. *McAnnulty v. McAnnulty* (126 Ill. 26), 552.

10. Purchase of land with earnings of wife's business.] Lands purchased and paid for by the wife, with the profits and earnings derived from business carried on by her in her own name, which have become a part of her statutory estate, cannot be subjected by the husband's creditors, though the conveyance was executed after the accrual of their debts; and where the consideration of the conveyance is an account of goods sold after the accrual of the complainant's debt, which were the accretions of her business, constituting a part of her estate, it cannot be considered as her subsequent earnings, and cannot be subjected to the payment of the debt. *Carter v. Smith* (83 Ala. 334), 738.

Partnership by married woman.] See SALE, 140.

MASTER AND SERVANT.

1. Discharge — drunkenness.] A master may discharge his servant for public drunkenness and disorderly conduct, although it was only on one occasion, and did not incapacitate the servant or cause him to fail in the performance of his work. *Bas Furnace Co. v. Glasscock* (83 Ala. 453), 748.

MASTER AND SERVANT — *Continued.*

2. Discharge — re-employment.] A master having discharged a servant has no right to recall him on pain of forfeiting all claim for compensation, but if the servant is not otherwise employed, he may recall him to do a part of the stipulated work without restoring him to his former position. *Mitchell v. Toale* (25 S. C. 238), 502.
3. Fellow-servants — conductor and laborer.] A conductor of a material train is not a fellow-servant with a laborer on the train, even in adjusting a switch. *Coleman v. Wilmington, Columbia, etc., R. Co.* (25 S. C. 446), 516.
4. Negligence as to machinery — promise to repair — contributory negligence.] If an employee, while engaged in the service, acquires knowledge of any defect in the materials, machinery or instrumentalities used, he may notify the employer of the defect, and continue in the service for a reasonable time, relying on the employer's promise to remedy the defect; yet if the defect is not remedied within the promised time, his further continuance in the service is at his own risk, and he is guilty of contributory negligence. *Eureka Co. v. Bass* (81 Ala. 300), 153.
5. Notice.] Where an employer is a corporation, notice of a defect in the appliances may be given to an agent in charge. *Id.*
6. Scope of employment — willful assault.] A railway ticket-agent left another employee in charge of the ticket office. He returned to a purchaser too little change, and on being asked for it, assaulted him. *Held*, that the company was liable. *Pick v. Chicago & Northwestern Ry. Co.* (68 Wis. 469), 378.

See PATENTS, 333.

MERGER.

See WILL, 381.

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See FIXTURES, 411.

MUNICIPAL CORPORATION.

1. License — revocation.] Under a statute authorizing telegraph companies to erect their lines in any streets in a city designated for that purpose by such city, a common council cannot revoke such a designation of the streets, when the company has conformed to the condition upon which the designation was made, and has expended money in placing poles upon the designated streets. *Hudson Telephone Co. v. Jersey City* (40 N. J. Law, 303), 619.
2. Ordinance — prohibiting dealing in second-hand clothing.] Authority of a municipal corporation to pass ordinances necessary or proper to prevent the introduction of contagious or infectious diseases and to preserve the health of the inhabitants, does not empower it to enact an ordinance making it unlawful to import or sell or otherwise deal in second-hand or cast-off garments, blankets, bedding or bed-clothes, excepting the sale of such

MUNICIPAL CORPORATION — *Continued.*

articles when not imported or which have not been used by persons having infectious diseases. *Town of Greensboro v. Ehrenreich* (80 Ala. 579), 180.

See CONSTITUTIONAL LAW, 112.

NEGLIGENCE.

1. **Action — personal injury — immediate death.]** Under a statute providing that "all causes of action shall survive notwithstanding the death of the party entitled or liable to the same," an action lies for negligent personal injuries resulting in instantaneous death. *Connors v. Burlington, C. R. & N. Ry. Co.* (71 Iowa, 490), 814.
2. **Causing death — contributory negligence of deceased — remote cause.]** No action can be maintained by an administrator for the death of his intestate, caused by intoxicating liquor sold him by the defendant. *King v. Henkie* (80 Ala. 505), 119.
3. **Contributory — brakeman out of place.]** A railroad brakeman is not necessarily guilty of contributory negligence by merely being in the engineer's cab instead of at his brakes. *Connors v. Burlington, C. R. & N. Ry. Co.* (71 Iowa, 490), 814.
4. **— of person riding with driver of private vehicle.]** Where by the concurrent negligence of the driver of a private carriage and the supervisors of a highway an injury occurred to a person riding with the driver, the injured person was guilty of contributory negligence if he joined with the driver in running the risk. *Township of Crescent v. Anderson* (114 Penn. St. 645), 367.
5. **— trespasser on railway track.]** If a person goes on the track of a railroad, without right, in advance of an approaching train, so near that preventive effort cannot avoid a collision, he is guilty of contributory negligence which will prevent a recovery of damages; but if there is no immediate danger, when he enters on the track, and he uses ordinary care to escape so soon as the danger becomes apparent, his negligence does not bar an action for damages; nor will a recovery be barred by his negligence, if the persons in charge were guilty of wanton, reckless or intentional omission to use the available means to prevent a collision, when a prompt resort thereto might have prevented it without danger to the passengers or freight. *Fraser v. South & North Alabama R. Co.* (81 Ala. 185), 145.
6. **— walking on defective sidewalk.]** A pedestrian in a city is not necessarily negligent in walking on a sidewalk which he knows to be unsafe, in a dark night, as the nearest way to his destination, instead of taking another way which is also unsafe. *City of Alleona v. Lots* (114 Penn. St. 238), 346.
7. **Nuisance — contractor.]** The owner of a portable steam-engine contracted with a railroad company to pump the water from an excavation on the land of the company near the highway. The plaintiff, driving on the highway, was injured by reason of his horse's fright at the engine. The defendant had no control over the use of the engine. *Held*, that it was not liable. *Wabash, St. Louis & Pacific Ry. Co. v. Furser* (111 Ind. 195), 696.

NEGLIGENCE — *Continued.*

3. Pond on private premises — infant trespasser.] The owner of a city lot is not liable for the death of a child who falls into an unfenced pond on his lot, it not being so near the street as to be dangerous to passers. *Kiss v. Nieman* (68 Wis. 271), 854.
- Of tenant.] See LANDLORD AND TENANT, 656.
- See MASTER AND SERVANT, 152; PHYSICIAN, 668; RAILROAD, 82, 145, 432; WAREHOUSEMAN, 76.

NEGOTIABLE INSTRUMENT.

1. Action for protest after waiver.] The drawee of a bill of exchange cannot maintain an action against the holder for protesting the bill after waiver of protest by drawer and indorsers. *Bellinger v. Glenn* (80 Ala. 190), 98.
2. Certificate of deposit — statute of limitations.] A banker's certificate of deposit in the ordinary form is a negotiable note, and the statute of limitations attaches to it from its date, without demand. *Curtan v. Witter* (68 Wis. 16), 827.
3. Evidence to show payment was to be made.] In an action on a promissory note, between the original parties, evidence is competent to show that at the time of its execution it was agreed that it might be paid in merchandise, and that it was so paid. *Buchanan v. Adams* (49 N. J. Law, 636), 666.
4. Part failure of consideration — evidence of.] In action by an indorsee before maturity on a promissory note given for goods sold, the defendant offered to show that at the time of its execution, the parties, not knowing the exact quality of the goods, agreed that if they fell short of the estimated quantity, a corresponding deduction should be made from the note, and that the goods did fall short of the estimated quantity; and that the plaintiff had notice of these facts before the indorsement. *Held*, admissible. *Brady v. Henry* (71 Cal. 481), 543.
5. Transfer after maturity — stolen bonds — default — interest.] A railroad company issued mortgage bonds payable with interest semi-annually, and conditioned that in case of non-payment of interest on demand, or of default for six months in making contribution to a sinking fund stipulated in the bonds, the principal should become due in six months from such default, without further demand or notice. The bonds in suit were stolen from plaintiff in 1876 and bought by defendant in 1881. No interest had been paid for 1877, 1878 or 1879, and no contribution had been made to the sinking fund, and a suit had been commenced to foreclose the mortgage for such defaults. *Held*, that the bonds were overdue when bought by the defendant, and not having been bought by him from a bona fide purchaser before maturity, plaintiff was entitled to recover for conversion of the bonds. *Northampton National Bank v. Kidder* (106 N. Y. 231), 443.

NEW TRIAL.

1. Juror — misconduct.] In an action against a life insurance company, one of the jurors was preliminarily asked if he held any policy issued by the

NEW TRIAL—*Continued.*

defendant, and answered no, although the defendant had issued one to him on his life for the benefit of his wife. The plaintiff was ignorant of this fact. *Held*, that he was entitled to a new trial, notwithstanding the juror's affidavit that he was influenced solely by the law and evidence. *Pearcy v. Michigan Mutual Life Ins. Co.* (111 Ind. 59), 673.

2. Smallness of damages.] A new trial will not be granted in an action for assault merely on the ground of the smallness of the damages awarded. *Pritchard v. Hewitt* (91 Mo. 547), 265.

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NUISANCE.

- Dwelling-house**—obstruction to air and prospect.] A private dwelling-house may not be declared a nuisance by authority of the legislature, simply because it may injure adjoining property by cutting off the breeze from, and the view of the sea. *Quintini v. Board of Aldermen* (64 Minn. 488), 63.

See CRIMINAL LAW, 592, 611; NEGLIGENCE, 606.

ORDINANCE.

See CRIMINAL LAW, 790; MUNICIPAL CORPORATION, 130.

PARENT AND CHILD.

1. **Action for injury to child employed in dangerous business.]** To sustain an action by a father for an injury to his minor child employed in a dangerous business without his consent, the defendant must be averred and proved to have known of the minority. *Gulf, Colorado & Santa Fe Ry. Co. v. Redeker* (67 Tex. 190), 20.
2. **Grandparent — services.]** If a grandparent receives his grandchild into his family as a member of it, no presumption is raised of a promise on the part of the grandparent to pay the grandchild for services, such as a child generally renders as a member of the family. *Dodson v. McAdams* (96 N. C. 149), 408.
3. **—.]** Where the grandparent declared several times that he intended to give her a part of his property as he would his children, and that she should be paid for the services, *held*, not sufficient to prove a promise to pay for her services. *Id.*
4. **Presumption.]** Such services are not gratuitous, but are presumed, in the absence of evidence of an express promise, to be rendered as a recompense for the care and protection extended to the child. *Id.*

PARTNERSHIP.

1. **Lands deeded to partners — resulting trust — parol evidence — dower rights of administrator.]** Where real estate is purchased by a firm, with partnership money, and for use in the partnership business, but is deeded to the partners in their individual names, *held*, (1) that it belongs to the firm; that the individual partners only hold the title in trust for the firm; and that such trust may be shown by parol testimony; (2) that after the death of a partner, the firm and the partners all being insolvent, the widow of the deceased partner is not entitled to dower therein. *Paige v. Paige* (71 Iowa, 818), 799.
2. **Accounting.]** One partner may be compelled to account to his copartners for profits derived from clandestine dealing with third parties in fraud or to the disadvantage of the copartners. *Kilbourn v. Latta* (5 Mack. 304), 878.
3. **Part profits as compensation for services.]** Where one furnishes money to be used in a certain business by the receiver for the former's benefit, the receiver to have part of the net profits as compensation for his services, this does not constitute them partners. *Busard v. Bank of Greenville* (67 Tex. 83), 7.
4. **Payment of individual debt from firm assets — rights of creditors.]** A member of an insolvent firm may, with the consent of his partner, use the assets of such firm to pay premiums on a policy of insurance on his life for the benefit of his wife, to whom he is in good faith indebted, and partnership creditors cannot set aside the transaction unless they show fraud. *Hanover National Bank v. Klein* (64 Miss. 141), 47.

PARTNERSHIP — *Continued.*

6. Paying debts out of individual property.] A partner may pay a debt of his firm out of his individual property, even at the expense of his individual creditors. *Gallagher's Appeal* (114 Penn. St. 353), 350.

By married woman.] See SALE, 140.

Of husband and wife.] See MARRIAGE, 433.

See ACCOUNT STATED, 341; CRIMINAL LAW, 333; MARRIAGE, 776; STATUTE OF FRAUDS, 373, 358.

PATENTS.

1. Jurisdiction.] A State court has jurisdiction of an action, between residents of the State, to enforce a contract to assign a patent right for an invention. *Fuller & Johnson Manf. Co., Limited, v. Bartlett* (68 Wis. 78), 838.

2. Right of master in invention of employee.] A manufacturing company was preparing to put upon the market a new machine. Its superintendent, knowing this intention, voluntarily disclosed to the company a device of his own, and by direction of the company, with its materials and at its expense, voluntarily applied his device to the machines. *Held*, that this did not imply an agreement for the absolute assignment to the company of a patent for the device, but implied a perpetual license to the company to apply the device at those works, and sell the machines anywhere. *Id.*

PHYSICIAN.

Negligence — recovery for service.] A physician may recover for his services, although he was mistaken in his treatment, provided he was not negligent or unskillful. *Ely v. Wilbur* (49 N. J. Law, 685), 665.

PLEDGE.

Of stocks — right to redeem — unreasonable delay.] Stock was pledged in 1871, the pledgee advancing money on it from time to time while its value fluctuated from twenty cents on the dollar up to, but never more than the amount advanced. In 1881 the pledgee sold it for less than the amount advanced. In 1884 the pledgor sought to redeem and to hold the pledgee accountable for its value, greatly appreciated after the sale. *Held*, that his bill should be dismissed on account of the staleness of the demand. *Gilmer v. Morris* (80 Ala. 78), 85.

POWER.

Execution of.] See TRUSTEES, 769.

RAILROADS.

1. Aided by taxation — obligation to operate — effect of foreclosure.] A railroad company, aided in the construction of its road by taxation of a township at one terminus of its proposed route, may be compelled to construct, maintain and operate its road to that point, and on a foreclosure sale of the road and the company's franchise, the purchaser incurs the same obligation. *State v. Central Iowa Ry. Co.* (71 Iowa, 410), 806.

RAILROADS—*Continued.*

2. **Negligence—construction of platform and car-steps.]** The plaintiff, in attempting to step from a car on defendant's railroad to a station platform, fell between the steps and the platform and was injured. The car-steps and platform were constructed in the ordinary way, the intervening space being no more than was necessary, and no accident of the kind had happened before. *Held*, that the action could not be maintained. *Lafflin v. Buffalo & Southwestern R. Co.* (106 N. Y. 186), 448.
3. **Right to fence track in cities and towns.]** A railroad corporation has no right to fence its tracks in cities and towns where it is intersected by streets and alleys. *Blanford v. Minneapolis & St. Louis Ry. Co.* (71 Iowa, 810), 795.
4. **Street—duty toward child on track.]** A street railway company is bound to exercise the highest degree of diligence to discover and avoid injuring a young child on its track. *Galeston City R. Co. v. Hewitt* (67 Tex. 478), 83.

See CARRIER, 801; DAMAGES, 487; MASTER AND SERVANT, 878.

RECEIVER.

Trust mortgage—labor debts—priority.] A hotel company bought mortgaged land, and mortgaged it again in trust to raise money to build. The company became insolvent, and a receiver was appointed, who was authorized by the court to and did borrow money on his certificates to pay employees, and the certificates were declared by the order to be a lien on the land prior to the trust mortgage. On a foreclosure of the original mortgage a surplus arose. *Held*, that the order was void as to the priority provided, although it appeared that the employees had become riotous and threatened to destroy the hotel and other property of the company, unless they were paid. *Rath v. Attrill* (106 N. Y. 423), 456.

RECORDS.

Public—right to examine.] The statutory provision that "the records of the judge of probate's office must be free for the examination of all persons, when not in use by him," is limited to any person having an interest, his agent or attorney, and gives the right to take memoranda or copies; but it does not confer on attorneys, or other persons, who are engaged in the business of negotiating loans on mortgages of real estate, the right to make an abstract from the records of conveyances, of the titles to all the lands in the county, for future use in their business when required. *Randolph v. State* (52 Ala. 527), 761.

RESTRAINT OF TRADE.

See CONTRACT, 878.

RIPARIAN RIGHTS.

See WATER AND WATER-COURSES.

ROYALTIES.

See INSURANCE, 478.

SALE.

1. **Fraud—rescission.]** To authorize the vendor of goods to disaffirm the sale, and to recover against the purchaser with notice, the concurrence of three facts must be shown, 1st, the purchaser must have been at the time of the sale insolvent, or in failing circumstances; 2d, he must have had at the time a preconceived intention not to pay for the goods, or no reasonable expectation of being able to do so; and 3d, there must have been, on his part, an intentional concealment of these facts, or a fraudulent representation in reference to them. *LeGrand v. Bufault National Bank* (81 Ala. 128), 140.
2. **Bona fide purchaser.]** Although the original sale was voidable for fraud, at the election of the vendor, he cannot recover against a sub-purchaser for value who had no notice of that fraud. *Id.*
3. **Partnership by married woman — estoppel.]** When a married woman carries on business under the assumed name of a partnership, as "S. & Co.," she may be sued in the partnership name, and cannot plead her coverture in defense of the action, as against creditors who have dealt with her on the faith of it. *Id.*
4. **Stoppage in transit—delivery to agent.]** S. shipped goods by railroad to R. at A. station. When the goods arrived there R. paid the freight charges, receipted for the goods, and told the company's agent that he would leave the goods with him until he could send for them. Thereupon L., a creditor of R., attached the goods. Afterward the agent received notice from S. not to deliver the goods to R. *Held*, that it was too late for S. to exercise the right of stoppage in transit. *Sangstaff v. Stiz* (84 Miss. 171), 49.

SCHOOLS.

- Regulations—reasonableness.]** A school regulation that the doors shall be locked and no scholars admitted during the opening exercises of the morning session, a period of fifteen minutes, is reasonable, but due regard must be had to the weather, and the age, health and comfort of the excluded pupils. The detention of scholars for a short time after the close of sessions, for fault or misconduct, is reasonable, and even if exercised mistakenly, it does not amount to false imprisonment unless malicious. *Fertich v. Michener* (111 Ind. 472), 709.

SET-OFF.

- Cross-judgments.]** A judgment may be set off against a cross-judgment to prevent injustice, although the latter has been assigned to a third person. *Hoovey v. Morrill* (61 N. H. 9), 815.

SPECIFIC PERFORMANCE.

See WILL, 107.

STATUTE.

1. **"Manufacture"—gathering ice.]** The business of cutting and preserving ice for consumption is "manufacturing." *Attorney-General v. Lorman* (59 Mich. 157), 287.

STATUTE—Continued.

2. "Persons"—corporation—penalty.] A corporation is a "person," subject to a penalty, within a statute prohibiting the sale of intoxicating liquors, and is liable for such a sale by its committee at a ball ordered by it. *Stewart v. Waterloo Turn Verein* (71 Iowa, 236), 736.
3. "Send and convey" a letter.] Under a statute making it criminal to send or convey an insulting, indecent, lascivious, disgusting, offensive or annoying letter or communication to any female, an indictment charged that such a communication was sent by the defendant to Henrietta Conover. She was a married woman, residing with her husband. The communication was inclosed in a sealed envelope, directed to her husband at his post-office address and sent by mail. In the same envelope was a letter to the husband requesting him to hand the inclosed to his wife. Mrs. C.'s son got the letter from the post-office and took it home and handed it to her. She opened it and read it. *Held*, a sending to her by the accused. *Larison v. State* (49 N. J. Law, 256), 606.

STATUTE OF FRAUDS.

1. Oral agreement of partners to divide profits from sales of lands.] An oral agreement of partners to divide the profits of sales of lands is not within the statute of frauds. *Kilbourn v. Latta* (5 Mack. 304), 378.
2. Profits of working lands.] An agreement that one shall procure the conveyance of land to another, who shall pay for it, and that both shall open and work a quarry thereon and share the profits, is not within the statute of frauds. *Treat v. Hiles* (68 Wis. 344), 848.
3. An oral contract fully executed by one at the time of making is not within the statute of frauds, although by its terms not to be performed by the other within a year. *Washburn v. Doseh* (68 Wis. 436), 878.
4. Promise to pay debts of another.] An oral promise to a debtor to pay his debt to a third is not within the statute of frauds. *Ware v. Allen* (64 Miss. 545), 67.

STATUTE OF LIMITATIONS.

1. Acknowledgment.] An acknowledgment that a debt exists, without any promise to pay or expression of willingness to remain bound, will toll the statute of limitations, in the absence of conditions or circumstances rebutting the presumption of an intention to pay. *Chidsey v. Powell* (91 Mo. 632), 267.
2. Breach of agreement to pay stock subscription.] When the terms of a subscription to stock of a corporation bind the stockholders to pay "in such installments as may be called for by said company, and one per cent at the time of subscription;" and the corporation, becoming embarrassed, executes a deed of assignment for the benefit of creditors, not having called in all the stock subscribed, the statute of limitations in favor of the stockholders, as to their unpaid subscriptions, does not begin to run until a decree is rendered by a court of equity under a bill filed by creditors, making an assessment and call for the unpaid subscriptions. *Glenn v. Semple* (80 Ala. 159), 92.

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STOCK.

See CORPORATION, 769; PLEDGE, 85; STATUTE OF LIMITATIONS, 82.

STOCKHOLDERS.

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STOPPAGE IN TRANSIT

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SUNDAY.

See WAREHOUSEMAN, 78.

SURETY.

Extension of time — bankruptcy of debtor.] A wife joined her husband in a note, and mortgaged her separate property as security. The husband subsequently was discharged in bankruptcy. After that, the creditor, knowing all the facts, agreed to extend the time of payment for a definite period and to reduce the rate of interest, and the husband in consideration thereof promised to pay the debt. This agreement was indorsed on the note. The wife did not know of it. *Held*, that she was released. *Post v. Loeey* (111 Ind. 75), 677.

TAXATION.

1. **"Property" — credits, money and bonds.]** A statute allowing a municipal corporation to tax all persons and property within the town does not authorize a tax on solvent credits, money or bonds. *Vaughan v. Murfreesboro* (96 N. C. 317), 418.

2. **"Railroad purposes" — grain elevator.]** A grain elevator erected by a railroad company on its lands and used by it in transshipping grain is exempt from taxation as for railroad and transshipping purposes. *State v. Mayor and Aldermen of Jersey City* (49 N. J. Law, 540), 648.

Of legacies.] *See* CONSTITUTIONAL LAW, 337.

See CONSTITUTIONAL LAW, 99.

TRIAL.

See JURY, 73.

TRUSTEE.

Execution of power of sale.] When a trustee, having a power to sell lands with the assent in writing of the first *cestui que trust* for life, but no interest whatever in the property, joins with her and her children, subsequent *cestui que trust* for life, in a conveyance of the property on valuable consideration, with covenants of warranty; this is a good execution of the power, although the conveyance does not mention or refer to it. *Gindrat v. Montgomery Gas-Light Co.* (82 Ala. 596), 769.

VENUE.

See CRIMINAL LAW, 325.

WAREHOUSEMAN.

1. **Agency.]** W. shipped cotton to New Orleans by railroad, taking a through bill of lading. The railroad company, a warehouseman, and a steamboat company, had a general contract by which the railroad agreed to receive cotton from shippers and deliver to the warehouseman, who agreed to hold it till the arrival of the steamboat and then ship it thereon for New Orleans. W. knew nothing of this contract. *Held*, that the railroad company could not bind W. by a contract with the warehouseman in reference to W.'s cotton, which would relieve the warehouseman from the consequences of his own negligence or impose on W. the consequences of the contributory negligence of the railroad company. *Merchants' Wharfboat Association v. Wood* (64 Miss. 661), 78.
2. **Negligence.]** The cotton being burned while in the hands of the warehouseman, who had failed to ship it by the first boat for New Orleans, but had awaited the departure of the boat with whose owner he had the general contract above alluded to, *held*, that if he, as a man of ordinary prudence, had notice from the surrounding circumstances of the danger from fire to which the cotton was exposed, it was his duty to ship it by the first opportunity. *Id.*
3. **Remote cause.]** But if the fire did not occur from any of the causes which should have reasonably excited apprehension, but from another and distant source, not a cause of reasonable apprehension of danger from fire, then the warehouseman is not liable for the loss. *Id.*
4. **Sunday.]** It being lawful in Mississippi for railroads and steamboats to do business on Sunday, a wharfboat proprietor is liable for negligence in not shipping goods on Sunday, if it is his custom so to ship goods. *Id.*

WATER AND WATER-COURSES.

1. **Lake — riparian rights on.]** A body of fresh water five or six miles long, a mile wide in some places, fed by springs, having no connection with any stream except by a slough which is dry in summer, and without any natural current, is a lake, and riparian owners on it have no title to the soil beyond the water's edge. *Trustees of Schools v. Schroll* (120 Ill. 509), 575.
2. **Navigable river — obstruction added to obstructed stream.]** When a stream has long been rendered unnavigable by dams and bridges, the erection of a building in it at that point, which of itself would not materially obstruct navigation, may not be restrained at the suit of the public. *State v. Carpenter* (68 Wis. 165), 848.

WILL.

1. **Attestation — "in presence of testator."] If the signing of a will by the witnesses was in such a place that the testator might have seen them doing it if he had chosen, and he was not prevented from seeing it by physical inability, it was "in his presence." *Maynard v. Vinton* (59 Mich. 189), 276.**

WILL—*Continued.*

2. **Charity — uncertainty.]** A bequest in trust "to divide said remainder among such charitable institutions in the city of St. Louis as he (the trustee) shall deem worthy," is valid. *Hove v. Wilson* (91 Mo. 45), 232.
3. **Devise — in tail — contingent remainder — merger.]** W. devised to H. B. and her son C., for life, as joint tenants, and if C. should marry and die leaving lawful issue of such marriage, or the lawful descendants of such children, and if such lawful issue, or their lawful children should be in being at the time of the death of the survivor of said H. B. and C., then to such issue and children and their heirs in fee-simple; but if said C. should die without having been married, or without leaving such lawful issue, or the children of such lawful issue surviving him, then to testator's right heirs, who were the said H. B., one of the life-tenants, and her sister S. M. B. *Held*, not a devise in tail to W., but a devise to H. B. and C. for life, with contingent remainder in fee to the immediate children of C., or to the children of such children, according as the one or the other should be in being at the death of the survivor of the life-tenants; and that the reversion of the fee descended to H. B. and S. M. B., until the contingency happened. During the contingency H. B.'s moiety by mediate descent vested in C., and S. M. B.'s moiety was conveyed to him by bargain and sale. *Held*, that C.'s life-estate was merged, and the contingent remainder was defeated. *Craig v. Warner* (5 Mack. 480), 381.
4. **In consideration of services — specific performance.]** A will giving property to one in consideration of personal services rendered and to be rendered to the testator is valid, and may be enforced as a contract after the testator's death. *Bolman v. Overall* (80 Ala. 451), 107.
5. **Legacy — charge on lands.]** A will devised a tract of land to the testator's son W. In another clause a pecuniary legacy to a daughter was expressly charged on this land. Another tract of land was devised to another son, C., and a pecuniary legacy was given to another daughter, I. This last legacy was not expressly charged on the land devised to C., but the will provided that C. should manage the entire estate, including the land devised to him, until the legatees and devisees became of age, and that he should pay the legacy to I. by installments. *Held*, that the legacy to I. was a charge on the land devised to C. *Carter v. Worrell* (96 N. C. 358), 420.
6. **—.]** While a general or residuary devise of lands, "after the payment of legacies," charges those lands with the payment of legacies, those words will not apply to a specific devise in a former clause of the will, to which particular conditions are annexed, though the devisee is also nominated as executor. *Newson v. Thornton* (82 Ala. 402), 743.
7. **Life estate or fee — intention.]** When there is a devise to one in express terms for life, and then without words to indicate the extent of the devise over, *held*, that the latter devise carries a fee. *White v. Orenshaw* (5 Mack. 118), 370.

Revocation by marriage.] *See* MARRIAGE, 553.

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WITNESS.

Order of exclusion — disobedience — effect on party.] Where the court ordered the witnesses to be excluded, a party may not be deprived of the testimony of one who was present throughout the trial, where it was not known to the party or to him that he was to be a witness, and his presence had not been procured by the party or his counsel. *State v. Thomas* (111 Ind. 515), 790.

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WORDS.

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